88-2098

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NO. 88-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

TOWNSHIP OF PARKS,
Petitioner,

v.

BABCOCK & WILCOX COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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June 24, 1989

QUESTIONS PRESENTED

I. May a *Monell* action be dismissed without prejudice under F.R.Civ.P, Rule 41(a)(2) on conditions generally, if not totally, useless for protecting the interests of a defendant municipality, rather than be dismissed only upon terms designed to protect the municipality from the prejudice of bearing the substantial litigation expenses wasted in defending against plaintiff's provisionally and belatedly abandoned civil rights claims?

II. Does a voluntary dismissal without prejudice take defendant's property in violation of accepted judicial process, Article III and Amendment V of the United States Constitution, or the Federal Magistrate's Act, 28 U.S.C § 636(b)(1), when the compensation of defendant's reasonable expenses in excess of taxable costs wasted in defending the action is denied by affirmance of a

magistrate's recommendation, which 1) totally ignored all defendant's contrary precedent and argument, 2) was not reviewed in a *de novo* judicial hearing, and 3) has not been supported by any reasoned decision of an Article III judge?

III. In an insubstantial 42 U.S.C. §§ 1983 and 1988 action by a large multinational corporation against a small municipality for substantial damages and fees, did the District Court abuse its discretion under Rule 41(a)(2) either,

1) by ordering a voluntary dismissal of the corporation's claims other than with prejudice after substantial investment in completing the municipality's defense, after full discovery by the corporation and the date ordered for close of discovery had long passed, after the date set for hearing the municipality's ripe motion for summary judgment was twice

cancelled at the corporation's behest, and where the corporation offered no good reason for dismissing without prejudice; or, alternatively,

2) by ordering a voluntary dismissal without prejudice and without compensation of the municipality's reasonable expenses wasted in defending 30 months of aggressive litigation on claims brought for the apparent purpose of financial intimidation, where the only legal justification suggested for allowing such a dismissal was:

a) that a Rule 41(a)(2) "award of fees should only be allowed where the litigation against defendant was lacking in a legal basis, e.g. where the court lacked jurisdiction of the subject matter," Appendix (hereinafter "A") 11,

b) that the municipality's legal work product was possibly reusable in some

conceivable "subsequent litigation, if any," A11, which was neither pending nor contemplated at the time of dismissal, and

c) that the municipality's "efforts to this point will not have been in vain," A13, although the municipality's efforts were not compensated in any material respect and duplicitous litigation of plaintiff's claims was not foreclosed by the lower court's largely useless conditions?

IV. Does a Rule 41(a)(2) dismissal without prejudice and without compensation of more than defendant's taxable costs moot the defendant's pending claims for sanctions and fees under F.R.Civ.P. Rules 11, 16(f), and 37 for specific alleged abuses committed by plaintiff in the course of litigation?

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OPINIONS BELOW

The summary June 20, 1988 and September 26, 1988 Orders of the United States District Court for the Western District of Pennsylvania (Teitelbaum, J.) are reproduced herein at A1-A5. The May 19, 1988 and August 17, 1988 Magistrate's Report and Recommendations which were adopted by those Orders as the opinions of the District Court are reproduced herein at A6-A21.

JURISDICTION

The Supreme Court of the United States has jurisdiction under 28 U.S.C. § 1254(1)(1982) to review the December 13, 1988 Judgment Order of the United States Court of Appeals for the Third Circuit, A22, which summarily affirmed the final decision of the United States District Court herein. The Township's Petition for Rehearing was denied by the Court of

Appeals on January 25, 1989, A23. This Court, by its Order dated April 11, 1989, granted an extension of time until June 24, 1989 to file this petition for certiorari.

RULE AND STATUTE INVOLVED

F.R.Civ.P., Rule 41(a)(2):

> Except [under circumstances not applicable to this case], an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

Federal Magistrates Act, as amended, 28 U.S.C. § 636(b)(1)(1982):

> (A) a judge may designate a magistrate to hear and determine any pretrial matter . . .
>
> (B) a judge may also designate a magistrate to conduct hearings . . . and to submit to a judge of the court proposed findings of fact and recommendations . . .
>
> [A]ny party may serve and file written objections to such proposed findings and recommendations . . . A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made (emphasis added).

STATEMENT OF THE CASE

Petitioner Township of Parks, defendant-appellant below, is a township of approximately 3000 people in Armstrong County, Pennsylvania (hereinafter "Township"). Respondent, Babcock & Wilcox Company, plaintiff-appellee below, is a wholly owned subsidiary of McDermott Incorporated, which is in turn a subsidiary of McDermott International, Inc., a Panamanian corporation which reported more than $3.8 billion assets in 1988 (hereinafter "Corporation").

The Township seeks a writ of certiorari to determine how far federal pretrial procedures and this Court's ruling in Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), may be abused by a multi-billion dollar corporation for the purpose

of imposing coercive litigation costs on a small rural township as a means to defeat local representative government. Because of the "limited treasuries," id. at 724 (Rehnquist, J., dissenting), of the municipalities affected by such abuses, the issue presented here will only rarely reach this Court.

The plaintiff Corporation imposed on the Township substantial pretrial litigation expenses by forcing the Township to mount a defense against claims for millions of dollars in damages and attorneys fees. The Corporation sued under 42 U.S.C. § 1983 and 1988, claiming that the Township's Ordinance No. 9-16-85 constituted on its face an unconstitutional taking of an alleged property right to pollute. Joint Appendix filed in the Court of Appeals (hereinafter "R.") 19. The Corporation argued, apparently

for the first time in any court, that it had a property right to emit into the ambient air certain quantities of materials defined by the U.S. Environmental Protection Agency as "hazardous air pollutants," 40 CFR § 61.01(a)(1988), and that this property right was unconstitutionally taken by mere enactment of the Township's air quality Ordinance prohibiting such emissions in excess of certain prescribed limits.

Applying a broad Rule 8, F.R.Civ.P., "notice pleading" analysis, R.61, the District Court failed to address the substance of the jurisdictional and constitutional defenses presented in the Township's Rule 12(b)(6) motion to dismiss the Corporation's claims for declaratory judgment, damages and attorneys fees. The District Court failed to enforce or even address the specific pleading requirement

which the Township raised as a defense, R.227, and which is normally applied in the Third Circuit to protect local government from insubstantial civil rights claims. E.g. Negrich v. Hohn, 379 F.2d 213 (3d Cir. 1967); Colburn v. Upper Darby Township, 838 F.2d 663, 666 (3d Cir. 1988). Accordingly the Corporation was not required to specifically state the legal and factual basis for its alleged property right.

The District Court did however certify its denial of the Township's Motion to Dismiss for interlocutory appeal under 28 U.S.C. § 1292(b)(Supp. V 1987), holding that there was "substantial ground for difference of opinion" as to the legal validity of the Corporation's constitutional claims. R.84. The Court of Appeals declined without explanation to review the District Court's certified

decision.

The case then proceeded to discovery, which consisted primarily of the Corporation's repeated attempts to subpoena the Township Supervisors in a largely unsuccessful effort to infringe their legislative privilege. The Township attempted to appeal from an unprecedented ruling requiring the Township Supervisors to testify concerning their motives for enacting the challenged Ordinance, in violation of the legislators' long-recognized testimonial privilege. See e.g. Helstoski v. Meanor, 442 U.S. 500, 507-08 (1979); Searington Corp. v. Incorporated Village of North Hills, 575 F.Supp. 1295 (E.D.N.Y 1981); County of Los Angeles v. Superior Court, 532 P.2d 495, 497 (Calif. 1975); R.589. But the Court of Appeals, again without explanation, refused to hear this appeal.

Plaintiff, by its own reckoning, invested an "enormous sum," R.1407, 1409, on extensive pretrial, pursuing discovery and preparing its defense against summary judgment -- hearings on which were twice cancelled at the request of the Corporation over the Township's objection. After 30 months of intensive litigation by the parties the District Court granted plaintiff Corporation's motion to dismiss without prejudice and without payment to the Township of the reasonable expenses customarily awarded as a condition for such dismissals. A1. This dismissal was made pursuant to a magistrate's report and recommendations. A6.

The magistrate's report and recommendations addressed none of the arguments the Township presented justifying denial of a voluntary dismissal without prejudice. Nor did the magistrate

address any of the arguments the Township presented for granting reasonable expenses as a condition for any such dismissal. The Township objected to the magistrate's recommendations on these matters, A39, A49, A55, as well as his failure to address any of the Township's arguments. A94. District Court Judge Teitelbaum tacitly denied a requested de novo hearing required by 28 U.S.C. § 636(b)(1)(1982), A33, and adopted the magistrate's report and recommendations without any apparent review of the Township's detailed objections thereto.

The recommendations for Rule 41(a)(2) dismissal without prejudice and without reimbursement of defendant's reasonable expenses constituted the magistrate's only substantial involvement with the case, other than convening of settlement discussions and cancelling

hearings on the Township's Motion for Summary Judgment at the Corporation's request. In several material respects the recommendations revealed the magistrate's unfamiliarity with the factual background of the case.

For example, the magistrate stated, with no support in the record, "B&W argues that all obstacles initially posed by the Ordinance have either been removed or resolved by the parties." A8-A9. But the Township at no time removed any obstacles of any kind that may have been presented by the Ordinance to the Corporation's planned operations, nor resolved anything with respect to the Ordinance for the benefit of the Corporation. The Corporation itself never argued that the Township had done so. The magistrate's gratuitous statement to the contrary is simply unfounded. A82-A89.

The record clearly shows that the Township has consistently stood by its Ordinance to the full extent of its terms. No act by the Township, other than its defense of this suit to the point of summary judgment, gave the Corporation any reason to voluntarily dismiss its suit.

By abandoning its plans for an incinerator and this lawsuit, the Corporation avoided compliance with the Township's discovery requests concerning previous hazardous emissions from its facilities. The Township's request for Rule 37 relief for the Corporation's refusal to comply with reasonable discovery requests had been pending more than seven months when the Corporation moved for voluntary dismissal. A98. By the same tactic, the Corporation also avoided a Motion for Summary Judgment ripe for decision on the merits of its

frivolous claim to possess a property right to pollute.

The Corporation had claimed a constitutional property right to emit hazardous pollutants from a planned hazardous waste incinerator, though it was at all times during the pendency of this suit illegal under both state and federal law to operate such a facility, unless licensed. See 35 Pa. Cons. Stat. Ann. § 7110.307 (Purdon 1988); 42 U.S.C. § 2131 (1982). R.1251. The Corporation never obtained the state and federal licenses on which it premised its alleged property right to pollute. The Corporation could not have a right to do what was in fact illegal at all times during this suit. Therefore the Corporation voluntarily dismissed without prejudice, apparently in order to avoid summary judgment and potential sanctions for filing a § 1983

damages action which lacked any factual basis.

The Corporation offered no other credible reason for its about face. A64-A66. Hundreds of thousands of dollars worth of litigation effort by the Township was thus unnecessarily wasted, because the Corporation filed a suit for purposes of intimidation without having any grounds to claim the property right upon which its constitutional damages claim was premised.

The Township suggested that if a dismissal without prejudice were allowed after prolonged pretrial, on the eve of summary judgment, and without good reason, then the court should at least impose the usual Rule 41(a)(2)conditions, i.e. reimbursement of reasonable litigation expenses and compliance with certain discovery requirements. R.1391. Instead, on recommendation of the magistrate,

certain unusual and unprecedented conditions were included in the District Court's dismissal order, while the Township's suggestions were simply ignored. Aside from an award of something less than the taxable costs normally payable to a prevailing party under F.R.Civ.P. Rule 54(d) in any case, the court's conditions, which were suggested entirely by plaintiff Corporation, provided a superficial appearance, though not the reality, of according something of value to the Township. These conditions were rejected by the Township as of negligible practical utility. R.1507.

The lower courts' explanation for the denial of the Township's reasonable expenses is stated only indirectly in the magistrate's recommendation. A39-A41. The magistrate held that conditions for voluntary dismissal are adequate if they

provide some trivial benefit to defendant so that its efforts will not have been entirely "in vain if in fact the Ordinance is ever again challenged by the plaintiff," A13, even though defendant's efforts remain mostly wasted under the court's conditions for dismissal. The magistrate was able to implement this novel standard only by holding, 1) "that [under Rule 41] an award of fees should only be allowed where the litigation against the defendant was lacking in a legal basis," A11, and 2) that "where the product of the first litigation may be used in subsequent litigation, if any, any award of counsel fees is inappropriate," A11, though even plaintiff admits that no other litigation is pending or contemplated. A50.

The Township objected that these unprecedented holdings turn on their head

the basic principles governing Rule 41(a)(2) and therefore provide inadequate justification for denying an award of expenses under Rule 41. A45-A55. The Township also objected to the magistrate's factual errors and unsupported findings, A79-A94, and the holding that a voluntary dismissal without prejudice moots pending sanctions motions. A98-99.

The Township appealed from the District Court's summary order adopting the magistrate's recommendations on the grounds that Judge Teitelbaum abused his discretion by a) dismissing this case other than with prejudice and b) entering a dismissal without prejudice unconditioned either by compensation for the expense and effort wasted in the Township's defense, or by any terms sufficient to protect the Township from legal harm. The Township further alleged

that Judge Teitelbaum improperly denied a de novo hearing, based his decision on the erroneous legal precepts presented in the magistrate's report, and wrongly held the Township's pending Rule 11, 16(f) and 37 motions moot.

The Court of Appeals affirmed the District Court's order without hearing or opinion. A23.

SUMMARY OF ARGUMENT

The writ of certiorari should be allowed in this case for two reasons.

I. Abuse of Rule 41 in *Monell* Actions

Monell actions for damages under the Taking's Clause can be improperly used to coerce legislative action from local governments that lack the financial strength to sustain a defense against frivolous federal court suits that are not weeded out on motion to dismiss. This shortcoming of Monell raises in this case

an important question of federal law which has not been, but should be, settled by this Court.

Although phrased in broad terms, Rule 41(a)(2) discretion has become structured by guidelines developed over the fifty years since the Federal Rules were adopted. The decision below directly conflicts with the decisions of other Circuits that articulate these guidelines. For example, when formulating conditions for dismissal without prejudice under these guidelines, courts are expected:

1) to consider "principally the interests of the defendant, for it is the defendant's position the court should protect," e.g. McCants v. Ford Motor Co., 781 F.2d 855, 856 (11th Cir.), enforced, 789 F.2d 1539 (1986), while the "equities of the plaintiff" in exiting from its law-suit "are not a subject of consideration

under the rule," Home Owners Loan Corp. v. Huffman, 134 F.2d 314, 317 (8th Cir. 1943);

2) to "ensure that ... defendants return to the same position which they enjoyed prior to commencement of th[e] lawsuit," Citizen's Savings Ass'n v. Franciscus, 120 F.R.D. 22, 27 (M.D. Pa. 1988) by compensating their litigation expenses including reasonable attorneys' fees wasted in the lawsuit, even though the American Rule would not otherwise permit an award of defendant's attorneys' fees in the absence of bad faith, GAF Corp. v. Transamerica Ins. Co., 665 F.2d 364, 369 n.16 (D.C. Cir. 1981);

3) to deduct from defendant's award of expenses an amount representing any work product specifically found to be "useful ... in other litigation pending at the time [plaintiff's] motion for voluntary

dismissal was filed," McLaughlin v. Cheshire, 676 F.2d 855, 857 (D.C.Cir. 1982)(emphasis added), but to compensate work that theoretically could be used in other litigation that is merely possible. See also GAF Corp., supra, at 370.

Though these principles are commonly adhered to by the federal courts, indeed are uniformly followed without much discussion, the decision below abandons these principles without any discussion at all. As a result, this case causes a division among the Circuits on each of these fundamental principles. Moreover, the offer of gross misstatements of law as the tacit explanation for a sub silentio denial of fees also brings the Third Circuit in direct conflict with those Circuits which will reverse when a court fails to "adequately explain its refusal to condition [a] voluntary dismissal on

the payment of [defendant]'s wasted attorneys' fees." Taragan v. Eli Lilly & Co., 838 F.2d 1327 (D.C. Cir. 1988). By deciding this case, the Supreme Court could bring some uniformity and certainty to this increasingly important area of law by reaffirming the basic contours of the customary Rule 41(a)(2) principles as they have been constructed over the years by the lower federal courts.

The ever growing cost of federal pretrial procedures since Rule 41 was first adopted in 1938 has aggravated the problem caused by wealthy plaintiffs who would intimidate defendants with limited resources by imposing the burdensome and prohibitive costs of defending claims which the plaintiff has no intent to follow through to final resolution, should effective resistance be encountered. Defendants must rely on the basic

principles of Rule 41(a)(2) for protection against such abuse by plaintiffs who would litigate insubstantial claims to a point just short of final decision for their intimidation effect, only to dismiss on the eve of judgment in order to later recycle the same claims for the same ends.

The case now before the court on a fully developed record of clearly egregious conduct presents an excellent opportunity to address an extreme example of this abusive tactic. A decision in this case could send a message that the federal courts will not tolerate such abuses, particularly in a context where such tactics are employed to undermine the powers of local governments which, prior to Monell, were protected from such abuses by absolute immunity from suit. By deciding the substantive issue presented in this petition the Supreme Court may

address a significant problem left unanswered by Monell, and for the first time define the appropriate standards for exercise of judicial discretion under Rule 41(a)(2).

II. **Excessive Use of Summary Process**

The Article III judges below affirmed without hearing or opinion a magistrate's recommendation that itself refused to address any single argument of fact or law presented by the Township in opposition to the courts' dismissal without prejudice. This unusual means for reaching final disposition of this case presents an opportunity for this Court to define the proper limits, if any, on the use of summary procedures by the federal courts. This is an issue of increasing importance which has not been, but should be addressed by this Court.

The procedures used in this case

depart from concepts of proper judicial proceedings commonly accepted in our legal culture. We ordinarily expect courts to present a reasoned response to, rather than a wall of silence against, good faith, non-frivolous, fully reasoned arguments of fact and law, based on citations to authority in point, and presented in unquestionable compliance with all procedural requirements. The courts' arbitrary refusal to address or even mention any of the Township's arguments in this case so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, Rules of the Supreme Court, Rule 17.1(a), if not the enforcement of fundamental constitutional precepts.

These procedural errors may be cured by a summary remand for a reasoned

decision of the issues raised by the magistrate's application of novel Rule 41(a)(2) principles to this Monell action.

REASONS FOR GRANTING WRIT

I. THE TOWNSHIP'S PROPERTY AND LIBERTY INTERESTS HAVE BEEN TAKEN WITHOUT ANY HEARING OR REASONED DECISION BY AN ARTICLE III JUDGE

The purpose and effect of the litigation below was to punish the Township and intimidate it from enforcing its duly enacted and constitutionally valid Ordinance by imposition of intolerable litigation costs. Only after the Township unexpectedly secured the resources necessary to sustain the defense of this suit through to the point of final judgment did the Corporation move to dismiss.

The Township presented detailed argument in opposition to the Corporation's last minute motion to voluntarily dismiss its claims without

prejudice in this context. But not a single argument of law or fact raised in any of the Township's briefs was addressed by the magistrate or the Article III judges who adopted the magistrate's recommendation.

The issues ignored below were not insignificant. For example, the decisions below failed to address, or so much as mention the following issues raised and cases cited by the Township:

1) Dismissal without prejudice of this case is an abuse of discretion under the holding in the Third Circuit's leading Rule 41(a)(2) decision, Ferguson v. Eakle, 492 F.2d 26 (3d Cir. 1974), as well as precedents from other Circuits which would deny dismissal without prejudice after completion of discovery and on the eve of a final adjudication of plaintiff's claims, especially when plaintiff states

novel and insufficient reasons for dismissing. See e.g. Pace v. Southern Express Co., 409 F.2d 331, 334 (7th Cir. 1969); Paulucci v. City of Duluth, 826 F.2d 780, 783 (8th Cir. 1987).

2) This is the first case to dismiss without prejudice on terms favorable to plaintiff for the reasons the Corporation offered for dismissing, i.e., litigation expenses and unavailability of the state license on which its property claim was based. This is also the first such dismissal which ignores as apparently irrelevant, evidence that there was no factual basis for the suit and that the reasons for dismissal were disingenuous and in bad faith. For example the court completely ignores the brief submitted by the Commonwealth of Pennsylvania which expressly states to the court the Commonwealth attorney's first hand

knowledge that the Corporation's "delayed license" excuse for dismissal constituted no more than "blue smoke and mirrors." R.1512, R.1710.

3) This is the first case to hold conditions for dismissal without prejudice acceptable if the resulting prejudice to defendant can be said to be not totally "in vain", although the conditions provide insignificant, if any, protection from the harm caused by the dismissal; it therefore simply ignores without comment the usual rule that "dismissal should not be granted if it causes some legal harm to the defendant," Pittsburgh Jaycees v. United States Jaycees, 89 F.R.D. 166, 167 (W.D. Pa. 1981) (emphasis added).

4) By applying the novel "not in vain" standard, the magistrate made the first reported Rule 41(a)(2) decision that imposed unusual conditions embodying the

court's view of a desirable compromise settlement, rather than the customary curative conditions for relieving the financial and tactical harm which the dismissal has caused defendant.

5) This is the first case to render Rule 41(a)(2) superfluous by holding as a reason for denying fees that bad faith (i.e. an "action lacking in a legal basis," A11) must be proven to support an award of attorney's fees under Rule 41(a)(2).

6) This is the first case to render Rule 41(a)(2) superfluous by holding that fees will be denied under Rule 41(a)(2) on the basis of speculation that some undefined portion of defendant's work "product of the first litigation may be used in subsequent litigation, if any," A11, although no such litigation is pending or even contemplated at the time

of dismissal.

7) This is the first reported case to delegate to a magistrate unfamiliar with earlier phases of the litigation the task of deciding the conditions for voluntary dismissal without prejudice, and then deny a de novo hearing on defendant's objections to the magistrate's report. Cf. Bamdad Mechanic Co. v. United Technologies Corp., 109 F.R.D. 129, 130 (D.Del. 1985) (Rule 41(a)(2) ruling is a "judicial function" involving "[a]ll the concepts and processes of judicial determination" and must be "made by the court.")

8) This is the first known case to deny "costs reasonably incurred" by defining them to include only taxable costs, on the sole and demonstrably false ground that all other reasonable out of pocket costs are "commonly subsumed within

the award of attorney's fees," A18-A19, even though no such award was made. E.g. Dowdell v. City of Apopka, 698 F.2d 1181, 1191-92 (11th Cir. 1983).

9) An element of taxable costs, conceded as payable by the Corporation, should be included in the Court's Rule 54(d) order for payment of taxable costs, unless its denial is explained by the court. Brown v. Fairleigh Dickinson University, 560 F.Supp. 391, 415 (D.N.J. 1983).

10) Voluntary dismissal without prejudice on the grounds stated in the magistrate's recommendation, and without award of more than taxable costs, does not moot pending Rule 11, 16(f) and 37 requests for fees and sanctions, because that "would obstruct ... the purpose of discouraging the assertion of baseless claims and defenses without, in any

significant way, furthering any important Rule 41 policy." Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 604 (1st Cir. 1988).

The procedural devices applied by the courts below to ignore these issues and the strong precedents uniformly contrary to their decision stretch the techniques adopted for the efficient use of judicial resources past the point of breaching fundamental conceptions of due process. Simply ignoring all contrary argument, fact, and precedent in point, as the magistrate and the Article III judges did, and the courts' ignoring all the legal and factual errors relied upon by the magistrate to support his recommendation, carries the summary procedures in this case beyond proper constitutional bounds.

First, the courts below tolerated

the Corporation's intimidating litigation tactics in this case by,

1) refusing to address the Township's contention that the federal courts possessed neither (a) diversity jurisdiction over a frivolous damages claim based on a non-existent property right to pollute, e.g. Comtronics, Inc. v. Puerto Rico Telephone Co., 409 F.Supp. 800, 810-11 (D.P.R. 1975), nor (b) federal question jurisdiction over declaratory judgment actions stating constitutional defenses to anticipated state claims, e.g. Allegheny Airlines, Inc. v. Pennsylvania Public Utilities Commission, 319 F.Supp 407, 411-12 (E.D. Pa. 1970) aff'd 465 F.2d 237 (3d Cir. 1972), cert. denied, 410 U.S. 943 (1973); Illinois v. Kerr-McGee Chemical Corp., 677 F.2d 571, 577 (7th Cir.), cert denied, 459 U.S. 1049 (1982), R.51, R.1322;

2) refusing to apply the specific pleading rule to Monell claims, as is required in the Third Circuit, R.164;

3) refusing to hear the denial of the Township's Motion to Dismiss, which was certified for interlocutory appeal, R.84, R.110-194;

4) refusing to hear an appeal from an unprecedented order forcing testimony by legislators concerning their legislative motives, which violated 200 years of precedent, R.871-975.

Then, after escalating the costs of this litigation by thus refusing the timely exercise of judicial power, the federal courts further refused to apply the customary remedy for the wasted costs caused by this needless litigation when the Corporation finally dismissed its insubstantial claims. The cumulative effect of these decisions is to undermine

every citizen's fundamental democratic liberty to enjoy a representative or "republican form of government," as guaranteed by the Constitution Art. IV, Sec. 4. The value of the townspeople's vote has been eroded by the federal judiciary's pricing of their local government's defense of its valid public health enactment beyond the reach of this community, or of any small municipality facing a similar threat. The federal courts thereby render a valid ordinance a practical nullity and, at the same time, take away the Township's property interest in the sizable investment made to defend it.

Property rights representing about $300,000 worth of reasonable costs and attorney's fees are at stake here, as well as the right of the Township's citizens to have its local government enforce, free of

the prohibitive expense of unnecessarily prolonged, duplicitous and fruitless federal litigation, a valid law designed to protect their property values and public health. Liberty and property interests may not be taken without due process of law. Constitution, Amendment V. But these interests have been denied here without a fair hearing and without any apparent process of reasoned decision by any Article III judge.

In this case summary judicial procedures have combined to prevent the proper discharge of the judicial function, which under Article III of the U.S. Constitution is to be accomplished through "determination by such regular proceedings as are established by law or custom." Muskrat v. United States, 219 U.S. 346, 356 (1911). The regular and customary protections against mere arbitrary

determination, i.e., a fair adversarial hearing and reasoned decision by a judge holding office under the Constitution, such decision to be based on precedent or articulated logic responsive to the duly presented non-frivolous arguments and relevant legal authority, have all been abandoned here.

There is no indication in the summary order of District Court Judge Teitelbaum adopting the magistrate's recommendations that any hearing or de novo judicial determination whatsoever was accorded in this case. The judge's Order does not even say that he reviewed the issues raised in the Township's objections. Instead it reveals that he was so unfamiliar with them that he confused the respective filings of the parties. A1. The District Court's failure to comply with 28 U.S.C § 636(b)(1)

was further compounded by the Court of Appeal's application of summary procedures, which in the Third Circuit has become increasingly common in recent years, and excessive compared to other Circuits. See J. Cecil & D. Stienstra, Deciding Cases Without Argument: An Examination of Four Courts of Appeals (1987) 130-31; Annual Report of the Director of the Administrative Office of the United States Courts (1988) 111, 112 (only 34%. of Third Circuit merits decisions accorded oral argument; more than half of cases decided without opinion). As a result of this cumulative shortchanging of normal judicial process, no judge appointed for life under Article III of the Constitution has heard argument or made any reasoned, responsive decision on the issues presented in this case.

The Federal Magistrates Act

requirement of a de novo hearing on dispositive issues is not a mere technical vestige of an outdated constitutional notion. It is intended to protect against the bias of functionaries who might be tempted to curry favor with the powerful for purpose of promotion. There was potential for just such motivation in this case. The liability for wasted litigation expenses claimed by the Township was created by the actions of the former law firm of the present Attorney General of the United States who makes recommendations on appointments to the federal bench, a seat to which the career magistrate who gave that law firm virtually everything it requested in this case might well aspire.

The less than professional performance by the magistrate does not help to dispel suspicion. If one-sided

procedures and ad hoc rules of law are signals of a corrupted legal process, then flares are in the sky over this case. Not only did the magistrate ignore every argument made by the Township and the Commonwealth in extensive opposition briefs to the Corporation's dismissal motion, but he also made, and refused to correct, an obvious misstatement of fact to avoid even acknowledging that such briefs had been filed. The magistrate deceptively described as the Township's reponse to the Corporation's February 1, 1988 voluntary dismissal, a superseded January 18, 1988 Township filing, solicited by the magistrate. A6-A8. This was not only chronologically impossible, but was also directly contradicted by the earlier motion's express stipulation that it was effective only if the Corporation's claims are "not first voluntarily

dismissed." A92-A97.

The magistrate also invented a false motive for the Corporation's dismissal that was not even argued by the Corporation itself, supra p. 10, and made numerous unprecedented rulings inconsistent with well-established principles of law, based on nothing more than peremptory assertions and blatant miscitations of authority. A41-A47, A50, A57-62. Other material factual conclusions were nothing more than arbitrary pronouncements, with no analysis or even mention of the relevant evidence to the contrary. R.32, A69-80. The refusal of the Article III judges to take any note whatsoever of the Township's detailed objections to the magistrate's legal and factual errors coumpounded the problem.

If this is not the proper case to enforce Article III of the Constitution

and to draw a line limiting use by the federal courts of magistrates, unresponsive findings, unpublished decisions, and summary procedures to bury from view a decision blatantly contrary to law and justice, it is difficult to imagine just what constitutional protection against arbitrary decision-making by the federal courts remains.

II. THE DECISION BELOW APPLIED A NOVEL, CLEARLY ERRONEOUS RULE 41(a)(2) STANDARD DESIGNED TO DENY PROTECTION AGAINST MOST OF THE HARM CAUSED TO THE TOWNSHIP BY THE DISMISSAL WITHOUT PREJUDICE

The decision below invented a new standard for fashioning Rule 41(a)(2) conditions. Instead of providing the customary conditions that would protect the Township from any harm, the court below created novel conditions of negligible value to the Township, which were expressly designed only "to insure that the Township's efforts to this point

will not have been [entirely] in vain." A13. This "not [entirely] in vain" standard was adopted by the Third Circuit without reconciling its decision in Ferguson v. Eakle, 492 F.2d 26 (3d Cir. 1974), or the similar decisions from other Circuits. Ferguson held that a court should assess "the presence or extent of any prejudice to the defendant by the draconian measure of dismissing plaintiff's complaint." Id. at 29 (emphasis added).

By providing only minimal compensation for defendant's wasted efforts, the magistrate's new "not [entirely] in vain" test promotes coercive Monell litigation against small local governments whose limited treasuries are outmatched by plaintiffs who would use the courts for the political purpose of changing local laws through the

non-democratic means of financial intimidation. Here the Corporation has consumed several years and hundreds of thousands of dollars of the Township's resources, only to dismiss without prejudice its insubstantial facial constitutional claims on the eve of summary judgment, without any good reason for dismissing, without any significant compensation to the Township for its wasted efforts, or any deterrent to repeating the same tactic, and litigating the same claims, whenever it sees an opportunity to undertake some other project that would violate local air pollution laws.

Under the "not [entirely] in vain" test now adopted by the Third Circuit, voluntary dismissal without prejudice is permitted provided the court attaches to its dismissal a condition of some trivial

value for defendant. Though the conditions provided here might appear superficially advantageous, beneath their carefully concocted veneer, conveniently supplied by the Corporation's lawyers, there is virtually nothing in them of any practical value to the Township. These conditions are novel because they fail altogether to address the actual financial and tactical harm done to the Township from voluntary dismissal without prejudice at a late stage of litigation.

Other Circuits have uniformly fashioned conditions designed to protect defendant from wasted efforts in such circumstances by requiring compensation of costs, and often compliance with discovery requirements, so as to prevent "any prejudice" to defendant from the dismissal. Such customary conditions were requested by the Township but were tacitly rejected

without explanation in favor of useless and deceptive conditions that have never before been applied to any Rule 41(a)(2) dismissal.

The Supreme Court has yet to provide guidance to the lower courts for interpreting the generally worded Rule 41(a)(2). By addressing the Third Circuit's novel "not in vain" holding the Supreme Court may clarify that the basic objective of Rule 41, like that of the 1983 amendments of Rule 11, is to prevent the abuse of expensive federal litigation by compensating substantially all the defendant's wasted efforts. A decision in this case could serve that end through some minimal bridling of the judicial discretion exercised under the Rule.

III. THE DECISION BELOW CONFLICTS WITH WELL-ACCEPTED RULE 41 PRINCIPLES

The magistrate's recommendation not only created an aberrant "not in vain"

general standard, but also implemented that standard with two rulings that directly conflict with the Rule 41 principles developed in every other Circuit that has addressed these issues.

A) The Third Circuit Conflicts With Other Circuits By Adopting A Bad Faith Requirement For Awarding Rule 41(a)(2) Attorney's Fees

By affirming the magistrate's recommendation, the Third Circuit has now become the first Court of Appeals to rule that proof of bad faith litigation (i.e. an "action lacking in a legal basis," A11) is required before an award of reasonable costs and attorney's fees may be made under Rule 41(a)(2). All Circuits tacitly reject, and the D.C. Circuit has expressly criticized and rejected such a concept. GAF Corp. v. Transamerica Ins. Co., 665 F.2d at 369 & n.16. Cf. Taragan, 838 F.2d at 1340. Accordingly there is conflict between the Circuits as a result of the

ruling below, which, if not reversed, would subsume Rule 41(a)(2) within Rule 11 and make the former rule superfluous.

B) The Third Circuit Conflicts With Other Circuits By Denying Attorney's Fees Because The Defendant's Work Product Might Be Used In Some Possible Subsequent Litigation Not Pending Or Contemplated At The Time of Dismissal

The most common occasion for reducing the reasonable costs and attorneys fees awarded defendant upon voluntary dismissal without prejudice is when work product which would otherwise be compensated is reusable in pending litigation, and therefore retains measurable value for defendant. But the Corporation stated in this case that no further litigation was pending, or even contemplated, at the time of dismissal, A50, and the magistrate made no attempt to measure what residual value, if any, the Township's investment in this litigation might have in the event of subsequent

litigation of these claims.

The Third Circuit has stated a new principle in conflict with all other Circuits by justifying its denial of reasonable litigation expenses on the ground that "the product of the first litigation may be used in subsequent litigation, if any," although no such litigation is pending or even contemplated at the time of dismissal.

The very purpose of a voluntary dismissal without prejudice is to permit a plaintiff to raise a dismissed claim in a subsequent lawsuit. Otherwise plaintiff could dismiss with prejudice as of right without any conditions. A principle which would deny compensation of defendant's reasonable expenses where a subsequent lawsuit is merely possible would therefore defeat the very purpose of Rule 41(a)(2) to cure the harm from a dismissal when it

cannot be predicted that any of the work product may be reused. If the court cannot, at the time of dismissal, find that specific work product is reusable in pending litigation, then all defendant's wasted efforts are normally compensated.

Plaintiff's pursuit of the same claims in a case pending in another court is the one clearly recognized good faith reason for a dismissal without prejudice. Dismissal due to second thoughts about the wisdom of going forward with a suit at all, as here, is not in good faith, nor can it benefit from the deduction for the value of work product reusable in pending litigation.

The magistrate did not assess what work product could be reused, instead simply lumping all expenses except taxable costs together as prohibited attorneys' fees. A19. The magistrate denied

approximately $33,000 of out-of-pocket postage, telephone, travel, word processing, special secretarial and other costs exclusively related to the litigation of this case without any attempt to show how the product of these expenses might be "reused" in any subsequent case. A11.

Probably due to the consequences, under amended Rule 11, of losing a motion for summary judgment on insubstantial claims, there is an increasing number of reported decisions under Rule 41(a)(2). Through this procedure plaintiffs with weak, prematurely filed cases can, by paying defendant's wasted litigation costs, preserve their claims from final judgment, if they deem a second try worth the price. Except under extremely rare circumstances not present in this case,

the courts routinely make such awards of costs and fees to defendants under Rule 41(a)(2) without any showing of bad faith by plaintiff. The award is commonly reduced by an amount reflecting only the value of work product that is actually found to be reusable in a case pending between the parties at the time of dismissal. Any denial of fees must be adequately explained.

By reconfirming these general well-accepted principles in this case, the Court would bring order, uniformity among the Circuits, and greater predictabilty to Rule 41(a)(2) decisions. This case also permits reconsideration of the unforseen practical consequences of Monell and its potential for abuse. A decision in this case could provide a salutary warning that abuse of Monell to undermine democratic processes by threatening the "limited

treasuries" of local governments, id. 436 U.S. at 724 (Rehnquist, J. dissenting), will not be tolerated. In this case the Court may affirm that a plaintiff will not be allowed to inflict financial punishment on a municipality and then retreat from a Monell lawsuit just prior to judgment, unless the plaintiff is subjected to full accountability for the municipality's wasted efforts under customary Rule 41(a)(2) principles.

CONCLUSION

The dismissal without prejudice of the Corporation's Monell action on conditions that cause substantial legal harm to the Township was done in an arbitrary fashion and without a reasoned decision by any Article III judge. The decision below expressly violated basic Rule 41(a)(2) principles followed in all other courts, and previously in the Third

Circuit. Because the procedures followed and the substantive rulings made below call for supervision by this Court, conflict with the rulings of other Circuits, and violate basic constitutional principles, the Court should grant a writ of certiorari to the United States Court of Appeals for the Third Circuit.

This case is appropriate for summary reversal and remand for a reasoned decision by an Article III judge.

Respectfully submitted,

ROBERT HAGER
2020 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 331-9831

Counsel for Parks Township

June 24, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BABCOCK & WILCOX, Plaintiff,	)	
v.	)	Civil Action No. 85-3035
TOWNSHIP OF PARKS, Defendant	)	

ORDER

AND NOW, this 20th day of June, 1988, after the plaintiff, Babcock & Wilcox, filed a "Motion for Voluntary Dismissal without Prejudice" pursuant to Rule 41(1)(2), F.R.Civ.P. in the above captioned case, and after the defendant filed Rule 56(b) and (c) "Motion for Summary Judgment on Grounds of Standing and Jurisdiction", and after the Report and Recommendation was filed by the United States Magistrate, which included proposed conditions upon which dismissal should be granted, and the plaintiff was granted ten days in which to accept or reject the

proposed conditions and the defendant was granted ten days in which to file objections thereto, and upon consideration of the plaintiff's request for clarification of the conditions as well as the plaintiff's acceptance of the conditions for dismissal recommended by the Magistrate and upon consideration of the objections filed by the plaintiff and the request for clarification of the Magistrate's Report and Recommendation filed by the defendant, and upon independent review of the pleadings, and the Magistrate's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that the plaintiff's motion to dismiss without prejudice pursuant to Rule 41(a)(2), F.R.Civ.P. is granted pursuant to the following conditions, and that the remaining motions

are dismissed as moot:

1. If it has not already done so, B&W will withdraw its permit application relating to the incinerator portion of the VRSF which was submitted to the DER, and will not install the incinerator portion of the VRSF in Parks Township.

2. B&W will conduct its present and future operations in Park Township in such a manner as to comply with the terms of the emission standards established in the Ordinance.

3. So long as the Ordinance remains unchanged and in its present form, B&W will bring no further action challenging the facial constitutionality of the Ordinance.

4. In the event that any further litigation develops between the parties, B&W will not object to reusing any discovery obtained in this suit in the

subsequent litigation provided it is relevant to the subject matter of that litigation.

5. B&W shall reimburse the defendant for costs exclusive of counsel fees it reasonably incurred in defending this litigation.

S/

United States District Judge

cc: [service list]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BABCOCK & WILCOX, Plaintiff,	)	
v.	)	Civil Action No. 85-3035
TOWNSHIP OF PARKS, Defendant	)	

ORDER

AND NOW, this 26th day of September, 1988, after the defendant, Parks Township, filed a verified

application for costs reasonably incurred in the above-captioned case, and after the plaintiff filed a response and after a Report and Recommendation was filed by the United States Magistrate recommending granting the defendant costs in the sum of $2,380.30, and the parties were granted ten days in which to file objections thereto, and after the defendant, on August 29, 1988, filed objections and a supplement to its cost application, both of which are without merit, and upon and upon independent review of the pleadings, and the magistrate's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that the defendant be awarded as costs the sum of $2,380.30.

S/

United States District Judge

cc: [service list]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BABCOCK & WILCOX, Plaintiff,	)	
v.	)	Civil Action No. 85-3035
TOWNSHIP OF PARKS, Defendant	)	

MAGISTRATE'S REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully recommended that the plaintiff's motion to dismiss without prejudice pursuant to Rule 41(a)(2), F.R.Civ.P. be granted pursuant to the conditions set forth below, and that the remaining motions be dismissed as moot.

II. Report

Presently before the Court for disposition are the plaintiff's "Motion for Voluntary Dismissal without Prejudice" pursuant to Rule 41(a)(2), F.R.Civ.P. and the defendant's Rule 56(b) and (c) "Motion

for Summary Judgment on Grounds of Standing and Jurisdiction".

Babcock & Wilcox ("B&W") commenced this action challenging the constitutionality of Parks Township Ordinance No. 9-16-85 ("the Ordinance"), which places limitations on the level of radioactive emissions permitted in the Township. Specifically, B&W became concerned about the Ordinance when it sought to modernize its Parks Township facility so as to operate a Volume Reduction Services Facility ("VRSF") in the Township. This facility would have had two different components, one involving compaction of low level radioactive waste materials and the other involving the incineration of such materials, all in preparation for their transportation to licensed burial sites.

B&W initially contended that the

Ordinance as enacted was so restrictive as to prevent the operation of the incineration facility. During the course of this litigation, B&W abandoned its plans to install the incinerator in Parks Township and instead elected to only install the compaction facility which B&W represented would in no manner exceed the tolerable emission levels permitted by the Ordinance. Indeed, based on this representation the Township has licensed the compactor. Accordingly, the plaintiffs have now filed a motion for voluntary dismissal without prejudice, and the defendant has countered with a motion for summary judgment for lack of standing due to the abandonment of the incinerator project by B&W.

In support of its motion B&W argues that since all obstacles initially posed by the ordinance have either been

removed or resolved by the parties, the complaint should be dismissed without prejudice. On the other hand, the Township now argues that the abandonment of the incinerator project by B&W removes any threat to B&W which was posed by the Ordinance, and hence there is no "injury-in-fact" and thus no controversy for adjudication.

Rule 41(a)(2), F.R.Civ.P. provides:

> Except as provided in paragraph (1) of this subdivision of this rule [relating to voluntary dismissal by a plaintiff prior to the filing of an answer or motion for summary judgment, or by joint stipulation of the parties], an action shall not be dismissed at the plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper... Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Generally, a dismissal without prejudice should be granted unless a

defendant will suffer some clear legal prejudice other than the prospect of possibly having to relitigate the issue at some future date. Davis v. USX Corp. 819 F.2d 1270 (4th Cir. 1987); Confay by Confay v. Wyeth, 793 F.2d 350 (D.C. Cir. 1986); McCants v. Ford Motor Co., Inc., 781 F.2d 855 (11th Cir. 1986); SBM Wageneder Gesellschaft v. Amer. Arbitration, 113 F.R.D. 659 (D.D.C. 1987). Rather, a court entertaining such a motion is charged with insuring that the action will not result in an inequity to the defendant who has involuntarily been brought into court by the actions of the plaintiff, and as a result has experienced costs and the various tensions inherent in any litigation. Davis v. USX Inc.., supra. Thus,

> the district court must exercise its broad equitable discretion under Rule 41(a)(2) to weigh the relevant equities and do justice between the parties in

> each case, imposing such costs and attaching such conditions to the dismissal as are deemed appropriate. McCants v. Ford Motor Co., Inc., supra. at 856-857.

However, as the court cautioned in SBM Wageneder Gesellschaft v. Amer. Arbitration, supra.,

> To condition a voluntary dismissal on an award of fees, the case law requires that defendant's efforts must have been unnecessary, not that the plaintiff must prevail. 113 F.R.D. at 663.

That is, an award of fees should only be allowed where the litigation against the defendant was lacking in a legal basis, e.g. where the court lacked jurisdiction of the subject matter. In addition, where the product of the first litigation may be used in subsequent litigation, if any, the award of counsel fees is inappropriate. Davis v. USX Inc.., supra, 819 F.2d at 1276. Further, as in Davis., supra, it appears that plaintiff's motion to dismiss

was brought in good faith only after extensive efforts to settle the matter proved fruitless.

In the instant case, it cannot be reasonably argued that the plaintiff's action was totally lacking in merit. It withstood an initial motion to dismiss as well as an interlocutory appeal. The record, however, does demonstrate that the course of this litigation has been arduous in that counsel have strenuously resisted each other's efforts to resolve this matter.

Nevertheless, at this juncture, it would appear that by agreeing not to install its incinerator, and thereby operate its Parks Township facility within the parameters established by the Ordinance, the plaintiff no longer has a necessity to challenge the constitutionality of the Ordinance. In a

similar manner, the only opposition to the Ordinance having been removed, there appears to be no legitimate reason at the present time for Parks to seek to have the Ordinance's constitutionality adjudicated. For this reason, there also appears to be a real question of whether there exists a case or controversy as required by Article III. Preiser v. Newkirk, 422 U.S. 395 (1975).

Thus, it would appear that the interests of justice as well as the parties would best be served by granting the plaintiff's motion for voluntary dismissal, without prejudice, subject to certain conditions being imposed which are designed to insure that the Township's efforts to this point, will not have been in vain if in fact the Ordinance is ever again challenged by the plaintiff.

For this reason, it would appear

that the imposition of the following conditions on B&W as a prerequisite for granting its motion would be appropriate:

1. If it has not already done so, B&W will withdraw its permit application relating to the incinerator portion of the VRSF which was submitted to the DER, and will not install the incinerator portion of the VRSF in Parks Township.

2. B&W will conduct its present and future operations in Park Township in such a manner as to comply with the terms of the emission standards established in the Ordinance.

3. So long as the Ordinance remains unchanged and in its present form, B&W will bring no further action challenging the facial constitutionality of the Ordinance.

4. In the event that any further litigation develops between the parties,

B&W will not object to reusing any discovery obtained in this suit in the subsequent litigation provided it is relevant to the subject matter of that litigation.

5. B&W shall reimburse the defendant for costs exclusive of counsel fees it reasonably incurred in defending this litigation.

Because of the recommendation made here it is not necessary for the court to consider the other pending motions, since the dismissal of the action renders all such matters moot.

A plaintiff seeking voluntary dismissal of his suit, without prejudice, should be given a reasonable time to either accept the conditions imposed on the dismissal or withdraw his motion. Unioil v. E.F. Hutton & Co., Inc., 809 F.2d 548 (9th Cir. 1986) cert. denied 108

S.Ct. 83 (1987). For this reason, the plaintiff will have ten days to accept or reject the conditions imposed on the granting of his motion, and all parties shall have ten days in which to file objections to this Report and Recommendation.

Respectfully submitted,
S/

ROBERT C. MITCHELL
United States Magistrate

Dated: May 19, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BABCOCK & WILCOX, Plaintiff,	)	
v.	)	Civil Action No. 85-3035
TOWNSHIP OF PARKS, Defendant	)	

MAGISTRATE'S REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully recommended that the defendant be awarded as costs the sum of $2,380.30.

II. Report

Presently before the Court is an "Application for Costs Reasonably Incurred" brought by defendant Parks Township.

On June 20, 1988 the plaintiff's motion to dismiss without prejudice pursuant to F.R.Civ.P. Rule 41(a)(2) was granted pursuant five numbered conditions. Condition 5 states "Babcock & Wilcox shall reimburse the defendant for costs

exclusive of counsel fees it reasonably incurred in defending this litigation." On July 25, 1988 the defendant filed a verified application for costs, to which the plaintiff has filed a response claiming that the majority of the listed costs are not cognizable under 28 U.S.C. § 1920 1/ and are in fact components of attorney's fees which were denied.

In granting a Rule 41(b)(2) voluntary dismissal, courts are granted the discretion to impose costs, not limited to taxable costs, including any litigation-related expenses. McCants v. Ford Motor Co., Inc., 781 F.2d 855 (11th Cir. 1986). The defendant claims

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1 The plaintiff implies that costs recoverable in a Rule 41(a)(2) dismissal are limited to taxable costs under 28 U.S.C. § 1920. This would limit the courts discretion and defeat the purpose contained within Rule 41(a)(2) of compensating defendant for reasonable expenses incurred in preparing for trial. See Bishop v. West American Insurance Co., 95 F.R.D. 494 (N.D. Geo. 1982).

$35,229.82 in costs accrued in thelitigation of this matter. The majority of these costs are for items which commonly are subsumed within an award of attorney's fees and which were specifically excluded by this Court, and thus should not be herein awarded. 2/ Costs commonly granted as a condition of a Rule 41(b)(2) dismissal include the costs of filing and preparing motions. See McLaughlin v. Cheshire, 676 F.2d 855 (D.C. Cir. 1982).

The defendant claims $352.50 in fees to the clerk. As $310.00 relates to unsuccessful appeals to the Third Circuit we need not address whether these costs are properly before this court. The remaining $42.50 is uncontested and may be granted. Similarly, the plaintiff does

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2 Included in this sum are personnel salaries, attorneys travel costs, postage, telephone and overhead for a total of $29,890.52.

not contest the sums claimed by the defendant for printing and copying costs, thus the sum of $940.20 in printing costs which are not disputed by the plaintiff may also be granted.

The sum of $1,337.60 in fees to court reporters for transcripts of depositions and a telephone conference hearing are also claimed. These appear to be appropriate costs in preparation for trial and thus may be granted.

The defendant claims the sum of $2,550.00 in witness fees and disbursements. The Supreme Court held in Crawford Fitting Co. v. J.T.Gibbons, Inc., 107 S.Ct. 2494,2496 (1987), that "when a prevailing party seeks reimbursement for fees paid to its expert witnesses, a federal court is bound by the limits of [28 U.S.C.] § 1821, absent contrary or explicit statutory authority to the

contrary." The statutory fee for witnesses is $30 per day. 28 U.S.C. § 1821(b). As the plaintiff avers that it has paid this statutory sum for five expert witnesses, the defendant offers no refuting statement, it would appear that the only sum due the defendant is $60 for the remaining two witnesses.

The defendant also claims the sum of $3,150.00 in attorney's fees for worked performed by Paul D. Boas, Esquire. As attorney's fees have been specifically excluded from recovery, there is no basis for the award of this fee.

It is therefore respectfully recommended that the defendant be awarded as costs the sum of $2,380.30.

Respectfully submitted,
S/

ROBERT C. MITCHELL
United States Magistrate

Dated: August 17, 1988

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 88-3483

BABCOCK & WILCOX,
Appellees

v.

TOWNSHIP OF PARKS
Appellant

(D.C. Civil No. 85-3035)

On Appeal From the United States District Court
For the Western District of Pennsylvania
Civil No. 85-3035
(Honorable Hubert I. Teitelbaum)

Submitted Under Third Circuit Rule 12(6)
December 6, 1988

Before: SLOVITER, BECKER, Circuit Judges and BARRY, District Judge*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the

judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT
S/

Circuit Judge
ATTEST
S/

Sally Mrvos, Clerk

DATED: DEC 13 1988

* Honorable Maryanne Trump Barry, United States District Court Judge for the District of New Jersey, sitting by designation

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 88-3483

BABCOCK & WILCOX,
Appellees

v.

TOWNSHIP OF PARKS
Appellant

(D.C. Civil No. 85-3035)

SUR PETITION FOR PANEL REHEARING
AND SUGGESTION FOR REHEARING IN BANC

Present: GIBBONS, Chief Judge, HIGGONBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, AND NYGAARD, Circuit Judges and BARRY, District Judge.*

The petition for rehearing filed by Appellant, Township of Parks, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT
S/

Circuit Judge

DATED: JAN 25 1989

*. Honorable Maryanne Trump Barry, United States District Court Judge for the District of New Jersey, sitting by designation, as to the panel rehearing only.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BABCOCK & WILCOX, Plaintiff,	)	
v.	)	Civil Action No. 85-3035
TOWNSHIP OF PARKS, Defendant	)	

OBJECTIONS TO REPORT AND RECOMMENDATION OF MAGISTRATE ROBERT C. MITCHELL

Defendant Parks Township ("Parks") respectfully submits the following objections to the Magistrate's Report and Recommendation entered herein on May 19, 1988, ("Magistrate's Report"), which granted a Motion for Voluntary Dismissal Without Prejudice ("Voluntary Dismissal") as was requested by plaintiff Babcock & Wilcox Company ("B&W").

INTRODUCTION

On a plaintiff's motion for dismissal brought under F.R.Civ.P., Rule 41(a)(2) at this late stage in the proceeding courts

in this Circuit will dismiss only with prejudice. Infra p. 6. Alternatively, courts customarily award reasonable attorney's fees for defendant's wasted efforts, unless good reason can be stated for not doing so. Infra p. 8. The Magistrate's Report recommends an unusual approach of dismissal neither with prejudice nor with award of attorney's fees, and fails to state any good reason therefor. Infra pp. 9-22.

Evidence of B&W's bad faith pursuit of groundless claims in this case furnishes an additional, independent basis for granting a Rule 41(a)(2) dismissal only with prejudice, or at least with sufficient award of attorney's fees to recompense defendant's wasted effort. With apparent reference to this additional Rule 41(a)(2) basis for imposing conditions, the Magistrate's Report, at 4,

recommends that B&W's action "cannot be reasonably argued" to be "totally lacking in merit." This statement contradicts the import of the court's § 1292(b) certification and is totally unsupported by fact or reason. Infra Part II, p. 23. Other statements in the Magistrate's Report favorable to B&W are also clearly erroneous and unsupported by any evidence of record. Infra Part III, p. 29.

The conditions on B&W's dismissal without prejudice recommended by the Magistrate's Report inadequately protect Parks' interests against the duplicitous expense and effort of relitigating B&W's claims, or against other legal harm. These conditions have been drafted in such an incomplete and ambiguous manner as to generate further disputes, rather than resolve the existing one, and must be modified if they are to provide any

significant protection to Parks' interests. Infra Part IV, p. 39.

STATEMENT OF THE CASE

B&W filed this suit against Parks on December 31, 1985. Extensive litigation over B&W's mostly unsuccessful attempts to discover privileged matter from the Township's Supervisors ensued. After Parks' reciprocal effort to obtain wholly unobjectionable discovery from B&W failed, on June 19, 1987, Parks Township's Application for Order Compelling Plaintiff to Comply with Discovery Requests was filed. In accordance with a deadline fixed by court order, Parks' Motion for Summary Judgment was filed on July 1, 1987. On September 14, 1987, after denying, as "outrageous," B&W's final discovery request, the court assigned this case to Magistrate Robert C. Mitchell "for all pretrial proceedings."

At the first status hearing before Magistrate Mitchell, on October 26, 1987, Parks sought early rulings on its outstanding motions, and B&W proposed a settlement on terms which Parks rejected as entirely unrealistic, as was further explained in Parks' November 10, 1987 Letter to McClenahan from Hager. In later rounds of correspondence about B&W's settlement offers, it was explained that, before Parks would stipulate to a dismissal of this action, B&W must either guarantee payment, under Rule 41(d), of the costs unnecessarily incurred by the Township on account of this litigation, or assure that these claims would not be relitigated. December 17, 1987, Letter to McClenahan from Hager, at 3; January 21, 1988, Lewis-Hager Settlement Proposal, Para. 5(C); February 4, 1988, Letter to Lynch from Hager, at 2-3; February 29,

1988, Letter to Lynch from Hager, at 1. B&W at all times refused to even discuss settlement terms that would include either a dismissal with prejudice or, alternatively, payment of Parks' reasonable litigation costs. B&W was nevertheless able to employ settlement negotiations as a tactic to avoid, over Parks' objection, the hearing on Parks' Motion for Summary Judgment, scheduled for January 7, 1988.

After subsequently rejecting the detailed January 21, 1988 settlement terms negotiated by Parks with B&W's house counsel, B&W interposed a plainly inadequate 3 1/2 page motion for voluntary dismissal, lacking any supporting reasons or suggested conditions, just days before the second scheduled hearing for argument of Parks' Motion for Summary Judgment. That hearing, rescheduled for February 8,

1988, was cancelled, over Parks' objection. On February 24, 1988 Parks filed its Suggestions for Conditions in Response to Plaintiff's Motion for Voluntary Dismissal Without Prejudice ("Suggestions").

Parks' Suggestions opposed B&W's voluntary dismissal of this action, unless granted only with prejudice or, alternatively, unless otherwise properly conditioned. Parks suggested that any dismissal without prejudice be conditioned, as is usual, upon 1) B&W's payment of Parks' litigation costs, including reasonable attorney's fees, 2) B&W's compliance with Parks' valid discovery requests, and 3) B&W's forgoing of further discovery on its claims. B&W countered with an entirely different 44 page submission, which for the first time proffered reasons and proposed conditions

for B&W's Voluntary Dismissal. B&W's second filing for voluntary dismissal required yet another response from Parks, see Brief in Support of Leave to File Reply to B&W's Response to Parks' Suggestions ("Leave to Reply"), to which B&W was permitted to reply in turn.

The conditions included in the Magistrate's Report implicitly reject the three conditions suggested by Parks, but with virtually no substantive discussion of those conditions. Three of the five conditions recommended by the Magistrate's Report were conditions suggested by B&W, and were explained to be of little value to Parks after B&W first suggested them. Reply Brief Opposing B&W's Response to Parks' Suggested Conditions ("Reply on Suggestions") 42-44. The other two conditions recommended by the Magistrate's Report, though of more value, are still

inadequate, mainly because of the manner in which they have been drafted.

STATEMENT OF THE QUESTION PRESENTED

As a consequence of the Magistrate's Report's unusual approach, marked by errors of fact and law and disregard of the arguments offered by defendant, "will the defendant suffer some injustice which cannot be rectified by the imposition of [the] terms and conditions on [B&W's] dismissal without prejudice" which it recommends? Selas Corp. of America v. Wilshire Oil Co. of Texas, 57 F.R.D. 3, 7 (E.D. Pa. 1972) (Lord, C.J.).

STATEMENT OF RELIEF SOUGHT

Parks requests a court hearing on its Objections, for purposes of rejecting or modifying the Magistrate's Report.

STANDARD OF REVIEW

On appeal from a magistrate's report under 28 U.S.C. § 636(b)(1) "[a] judge of

the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."

ARGUMENT

The Magistrate's Report abandons the guidelines of precedent and the constraints of fact to recommend unusual conditions, which serve B&W's interests, and generate problems rather than solutions.

I. THE MAGISTRATE'S REPORT IMPROPERLY FAILS TO RECOMMEND ANY OF THE CUSTOMARY CONDITIONS FOR VOLUNTARY DISMISSAL SUGGESTED BY PARKS

1) The Magistrate's Report Ignores Parks' Request for Dismissal of B&W's Suit Only With Prejudice.

In response to B&W's Voluntary Dismissal, Parks requested that B&W's suit only be dismissed with prejudice. Indeed the overwhelming bulk of Parks' briefing

on B&W's Voluntary Dismissal addressed this issue. Suggestions 5-21; Reply on Suggestions 2-30. The decision of the Court of Appeals for the Third Circuit that provides the controlling precedent for this case, held, on facts less compelling than those presented here, that it is an abuse of discretion for a District Court to grant a motion to dismiss without prejudice at this late stage of the proceedings, and thereby leave property rights uncertain. See Ferguson v. Eakle, 492 F.2d 26 (3d Cir. 1974); Suggestions 8-11. See also Thomas v. Amerada Hess. Corp., 393 F. Supp. 58, 70 (M.D. Pa. 1975) ("Were this court to allow plaintiff's motion, it could in good conscience only do so and specify with prejudice ..."); Suggestions 16. But the Magistrate's Report entirely ignores both the Third Circuit's controlling decision

and Parks' compelling arguments that it would be error on the facts of this case to grant B&W's Voluntary Dismissal, except on the condition that dismissal be granted only with prejudice.

Because the Magistrate's Report nowhere mentions Ferguson v. Eakle, it is difficult to assess why it did not recommend following the Third Circuit's controlling precedent. B&W has attempted to distinguish that case on the ground that one of the bases for decision in Ferguson v. Eakle was that legal harm was found to result there from the prolongation of the period during which property rights would remain uncertain, if plaintiff's federal suit were dismissed for pursuit of his pending state claims. B&W contends that, "[i]n this case, a dismissal will not result in any similar uncertainty." Babcock & Wilcox Company's

Response to Parks Township's Reply Brief Opposing Voluntary Dismissal Without Prejudice ("B&W's Response to Reply on Suggestions") 7. But on the contrary, Parks has shown that B&W's assertion of what amounts to an easement to pollute the property of Parks' landowners casts a shadow over property rights far more extensively than anything involved in Ferguson v. Eakle.

Though B&W argues that Parks' "Ordinance is presumed valid and can be enforced unless and until it is successfully attacked," B&W's Response to Reply on Suggestions 8, in fact B&W's very purpose for insisting upon a dismissal without prejudice is to recur to this expensive litigation -- not in a pending suit -- but at any time in the future that Parks amends, otherwise "changes," or attempts to enforce its Ordinance. See

Plaintiff's Response To Defendant's Suggested Conditions Regarding Voluntary Dismissal of Action ("B&W's Response to Suggestions") 39-40; February 1, 1988 Letter from Lynch to Hager 2 (in light of possibility of enforcement "B&W simply cannot waive its constitutional right to challenge the Ordinance's validity"). At such time as any enforcement of the Ordinance may be required, Parks' landowners and taxpayers will be faced with a choice between retreating from protection of their property through the enforcement of the Ordinance or paying to duplicate the efforts which will have been wasted in carrying this suit to the point of decision. Therefore the uncertainty of the rights of all of Parks' landowners to assure that their property is free of pollutants which violate Parks' Ordinance, now at issue in this suit, will be

unnecessarily prolonged, for even longer than in Ferguson v. Eakle, if B&W's groundless assertion of conflicting rights is not now laid to rest. Otherwise, under the conditions recommended in the Magistrate's Report, the expense to Parks' taxpayers of relitigating these claims will be used perpetually, as B&W expressly intends, as a bargaining chip in B&W's ongoing relationship with Parks over issues related to the enforcement or "change" of the Ordinance.

Accordingly, Parks objects to the Magistrate's Report's tacit, unexplained recommendation rejecting Parks' request for dismissal of B&W's claims only with prejudice.

2) The Failure of the Magistrate's Report to Recommend an Award of Attorney's Fees is Based on Errors of Fact and Law, and Lacks Sufficient Justification

The Magistrate's Report neither mentions, nor directly recommends denial

of, Parks' request for reasonable attorney's fees as a condition for dismissing B&W's suit without prejudice. Nor does it expressly justify its failure to award Rule 41(a)(2) attorney's fees. Since award of Rule 41(a)(2) attorney's fees is very common upon voluntary dismissal, Suggestions 22, Courts of Appeals normally hold that it is reversible error not to at least explain the denial of fees in such a situation. Reply on Suggestions 31.

Though it fails to recommend the award of reasonable attorney's fees as a condition of Rule 41(a)(2) dismissal without prejudice, or to address any of Parks' arguments supporting the award of such fees, the Magistrate's Report, on page 4, does mention fees in a single four sentence paragraph. In the absence of any direct mention of Parks' request for fees,

the three points made in the mentioned paragraph must be taken as an indirect discussion of the reasons why the Magistrate's Report omitted an award of attorney's fees, even though they are not expressly presented as such. As shown below, these three reasons provide no justification for denying fees in this case.

A) The Magistrate's Report Relies On an Erroneous Statement of Law For Its Tacit Denial of Rule 41(a)(2) Attorney's Fees

The Magistrate's Report ("Mag.") introduces its discussion of attorney's fees by quoting a passage from SBM Wageneder Gesellschaft v. American Arbitration, 113 F.R.D. 659, 663 (D.D.C. 1987). B&W employed a similar quotation, see B&W's Response to Suggestions 35, to which Parks previously replied. The quoted passage states that defendants'

fees will be reimbursed on plaintiff's voluntary dismissal without prejudice only where "defendant's efforts ... have been unnecessary". Mag. 4. Parks has easily distinguished on its facts the actual holding of SBM and has also explained SBM's definition of its test for when defendant's efforts are "unnecessary." See Reply on Suggestions 31. Neither the holding nor the test quoted from SBM would justify denial of attorney's fees in this case. SBM -- a case involving the denial of an arbitration injunction -- exemplifies the truly rare case where denial of Rule 41(a)(2) attorney's fees is appropriate, even where work product is not reusable, infra p. 13. The reasons which made dismissal without fees appropriate in SBM, that defendant enjoyed the fruits of its victory and that no other issues remained for adjudication,

bear no relationship whatsoever to the facts of this case. The language quoted by the Magistrate's Report about only "unnecessary" expenses being compensated on Rule 41(a)(2) dismissal was defined in SBM so as to support an award of fees under the circumstances of this case. SBM explained that it would consider defendant's efforts "undertaken unnecessarily" in those situations "where a plaintiff brings an action, causes a defendant to incur legal fees, and then on second thought withdraws the action." 113 F.R.D. at 662-63. The term used in SBM, and quoted by the Magistrate's Report, to define when Rule 41(a)(2) fees should be awarded, as shown below, describes this case, where B&W's reasons for dismissal amount to no more than second thoughts. See Leave to Reply 17.

B&W filed this suit before obtaining

the requisite state and federal licenses and permits. When the licenses were not forthcoming before the date beyond which summary judgment could no longer be delayed, whether by improper discovery attempts, motions for extension of time, or unreasonable settlement proposals, B&W filed its Voluntary Dismissal. The only plausible reason for B&W to abandon its plans and file its Voluntary Dismissal is to avoid certain summary judgment, and possible sanctions, for its total lack of evidence as to any recognized property interest upon which to predicate its civil rights claims. This litigation was "unnecessary" in its entirety because B&W should have waited at least until it obtained its required licenses and acquired some semblance of a claim to a property interest before wasting the court's, Parks' and -- according to its

stated reasons for seeking dismissal -- its own time and resources by filing this meritless suit. B&W's proffered reasons for voluntarily dismissing its premature Complaint say nothing different. B&W's premature commencement of litigation against Parks was, in the words of SBM, nothing other than "a mistake which forced the defendant to undertake expenses unnecessarily." 113 F.R.D. at 663.

Without benefit of any elucidating discussion of its reasoning, the Magistrate's Report follows the SBM quote with a misstatement of law having no support in any case, including SBM. No authority is cited by the Magistrate's Report and no respectable authority exists to support a Rule 41(a)(2) interpretation that "an award of fees should only be allowed where the litigation against the defendant was lacking in a legal basis."

Mag. 4. This purported rule of law might properly state one of the grounds for granting attorney's fees under F.R.Civ.P., Rule 11. (Confusion may have arisen, in fact, because language suggesting such a notion appears in the context of the SBM quote, which was mistakenly taken by the Magistrate's Report from that part of the SBM court's discussion addressing arguments "focuse[d] more on Rule 11 than on precedent providing a rationale for the award of attorney's fees under Rule 41(a)(2)," 113 F.R.D. at 663.) The lack of either a legal basis or a factual basis for B&W's claims may provide additional, independent grounds for granting Rule 41(a)(2) attorney's fees. Infra p. 23. But failure to satisfy the Rule 11 standard stated in the Magistrate's Report provides no reason to deny attorney's fees otherwise payable on Rule 41(a)(2)

dismissal, as was made abundantly clear in GAF Corp. v. Transamerica Ins. Co., 665 F.2d 364, 369, n. 16 (D.C. Cir. 1981). See Reply on Suggestions 20-22, 24; Leave to Reply 23. The District Court for the District of Columbia certainly does not rule otherwise in SBM.

No reasonable argument could be made that any court in this Circuit, or any Circuit Court anywhere would follow such a rule as was relied upon by the Magistrate's Report to recommend tacit denial of Rule 41(a)(2) attorney's fees. Cases cited by Parks as well as cases relied upon by B&W show that courts in this District and elsewhere routinely grant attorney's fees under Rule 41(a)(2) where there is no evidence of bad faith, nor any suggestion that plaintiff's claim "was lacking in a legal basis." Suggestions 22-23; Reply on Suggestions

31. This first ground for the tacit recommendation of the Magistrate's Report to deny Rule 41(a)(2) attorney's fees would be reversible error if relied upon by the District Court.

Moreover, the example, mentioned in the Magistrate's Report, at 4, of where "the litigation against defendant was lacking in a legal basis," i.e. where jurisdiction is lacking, would not exclude an award of fees in any event. As has been argued by Parks in its Brief in Support of Motion for Summary Judgment, 11-12, 24, because B&W's alleged property interest is based entirely upon a novel assertion of a state property right nowhere recognized in the law of the Commonwealth, and upon licenses which B&W does not possess, this case is a situation "where the court lacked jurisdiction of the subject matter." See also Parks' Reply Brief on Motion for

Summary Judgment ("Reply on Summary Judgment") 120-22. This issue has yet to be addressed by the court. Parks therefore objects to the failure of the Magistrate's Report to even consider this alleged jurisdictional defect in B&W's claims as a means of satisfying the stated exception to its erroneous Rule 41(a)(2) test while, at the same time, Parks also objects to the recommendation of an erroneous rule of law as a basis for denying an award of attorney's fees on Rule 41(a)(2) dismissal.

B) The Magistrate's Report Misapplies The Reusable Work Product Rule

The second apparent reason the Magistrate's Report recommends denying an award of attorney's fees to Parks is an incomplete reference to the rule that work product reusable in pending or contemplated litigation need not be

compensated under Rule 41(a)(2). This rule has been thoroughly discussed elsewhere. Leave to Reply 10-12, 32-33. It is clear that here, as B&W admits, "[t]here is no other action against the Township either pending or contemplated by B&W," to which such a rule would apply. B&W's Response to Suggestions 3.

The case cited in the Magistrate's Report to support denial of fees for work product that "may be used in subsequent litigation, if any" does not support its statement of the rule. Mag. 4. Davis v. USX, Inc., 819 F.2d 1270, 1272 (4th Cir. 1987) involved actually pending litigation. Infra p. 18. Meanwhile, the only precedent insisted upon by B&W for supporting the application of the rule to a case such as this one, where subsequent litigation is merely "potential" or within the "realm of possibility," B&W's Response

to Suggestions 40, rather than pending, is unreasoned dicta, or at best an alternative and make-weight ground for decision, from a case easily distinguishable from this one on its facts. See B&W's Response to Reply on Suggestions at 6-7 & n.5; Leave to Reply 15-16.

Bready v. Geist, 85 F.R.D. 36, 38 (E.D. Pa. 1979) involved a reduction of a Rule 41(a)(2) fee award because, due to plaintiff Bready's difficulty in retaining counsel, there was a "particularly strong" possibility that subsequent litigation could not be filed within the statute of limitations. The strong odds against any further litigation therefore would likely accord defendant the benefit of a dismissal with prejudice, for which attorney's fees are never appropriate. See Suggestions 2. In Bready the work

product that could be reused if the case were refiled was forseeable since the claim would be refiled within the short period remaining for tolling the statute of limitations. The trial court in Bready was thus able to find specifically that certain named work product would be reusable in the action that Bready contemplated refiling, if a lawyer could be retained.

Bready never mentions or remotely suggests that the District Court there would subscribe to B&W's application of the "reusable work product" rule so as to reduce Rule 41(a)(2) fees when unspecified work performed in the dismissed suit might in some unstated manner be used to defend against distant "potential" claims of unknown parameters. Bready was an unusual case, virtually standing alone, where a clearly contemplated suit of known

definition could support a finding of fact that specific work product could be reused if suit were refiled in the immediate future. This in turn provided a make-weight argument to support a reduction in Rule 41(a)(2) fees which was actually justified on entirely different grounds, i.e., that relitigation was, in fact, unlikely.

Bready provides no support for a rule that Rule 41(a)(2) fees may be reduced for work product not reusable in a suit which is either pending or, perhaps, one that is clearly contemplated in the immediate future. Indeed, nothing but dicta, either in Bready or any other case, supports the extension of the rule beyond its usual application to cases actually pending in another court at the time the reusable portion of the work product is determined. Accordingly the reference to the reusable

work product rule in the Magistrate's Report affords no support whatever for denying attorney's fees in this case.

Moreover the statement of the rule in the Magistrate's Report fails to convey that only the portion of the work product actually identified by the trial court as reusable is left uncompensated. Here there are no findings of fact or any analysis of what, if any, of Parks' work product could in fact be reused in any "potential" future suit between these parties. Under the recommended conditions, nearly all of Parks' work product related to discovery will have to be duplicated in a subsequent suit, unless the conditions suggested by Parks are also accepted. Infra p. 22. Since it is unlikely that B&W would advance its facial constitutional claims on the minimal record it presents in this case, work on

the merits will also need to be duplicated.

Parks thus objects to the inclusion of the "resusable work product" ground for recommending denial of all Rule 41(a)(2) attorney's fees as both contrary to existing precedent and unsupported by the required findings of fact.

C) The Conclusion of the Magistrate's Report Concerning B&W's Good Faith Lacks Factual Support and Furnishes No Legal Basis for the Denial of Rule 41(a)(2) Attorney's Fees.

The Magistrate's Report makes the observation, unsupported by any other evidence or reason, that "it appears that the plaintiff's motion to dismiss was brought in good faith only after extensive efforts to settle the matter proved fruitless." Mag. 4. This statement begs two questions in one sentence. First there is no support in the record for the

bare conclusion that B&W's Voluntary Dismissal was brought in good faith, and no such conclusion can be fairly made in the absence of any examination of the evidence, any findings of fact, or any analysis whatsoever of either Parks' or B&W's statement of the reasons why B&W dismissed. It does not constitute good faith to dismiss for purposes of avoiding summary judgment on groundless claims, or of avoiding discovery after having forced discovery from the Township Supervisors, and having burdened with a "prohibitively expensive" lawsuit, a small local government having vastly fewer resources, for no better reason than that B&W has had second thoughts about the cost of litigation and its still unlicensed project. Second, it cannot be probative of good faith that B&W's dismissal followed a successful attempt to delay

resolution of this matter, avoid summary judgment, and increase Parks' litigation expenses even further through an "extensive" settlement process wherein B&W offered settlement terms for abandoning its groundless claims that were substantially less favorable to Parks than even the inadequate conditions now recommended in the Magistrate's Report. Infra p. 39.

The Magistrate's Report cites Davis v. USX, Inc., 819 F.2d 1270, 1276 (4th Cir. 1987) apparently to suggest a legal basis for the proposition that a prior offer of settlement lends a quality of good faith to a voluntary dismissal. Mag. 4. But no mention of settlement can be found there. Neither Davis nor any other case holds that a settlement offer less adequate than a court would provide upon a Rule 41(a)(2) motion can lend any patina of good faith

to a dismissal without prejudice, much less one requested for purposes of delay and avoiding summary judgment, rather than for the typical reason of pursuing claims pending in another court. No case has been found by Parks where a prior offer of settlement has even been considered relevant to the disposition of a Rule 41(a)(2) motion. Unless connected by some analysis of whether a prior settlement offer was reasonable, the mere fact of such an offer could have no bearing on the assessment of plaintiff's good faith.

Davis, was a Title VII action where the plaintiff sought to dismiss her federal suit in order to pursue her common law claims in the pending "action she had filed in state court." 819 F.2d at 1272. On review of the lower court's dismissal without prejudice, the Court of Appeals upheld conditions that plaintiff pay costs

and also agree to the use in state court of materials discovered by defendant. But an award of attorney's fees to defendant was reversed because the Court found it "evident from the record that the work and resources expended ... will easily be carried over to [the] litigation" then pending in state court. 819 F.2d at 1276. The court further supported its ruling with the observation that the "[i]mposition of conditions limiting a plaintiff's recourse to the state courts may also be an affront to principles of comity because such conditions may usurp the authority of the state courts to resolve questions of state law." 819 F.2d at 1275.

Contrary to the impression that might be conveyed by the Magistrate's Report, at 4, the court's opinion in Davis nowhere mentioned anything about a settlement or

about the effect of a settlement offer on a determination of bad faith. With respect to this issue, the Davis court simply made the customary observation that there was "no evidence that the plaintiff has proceeded in bad faith during the litigation in federal court ..." 819 F.2d 1276 (emphasis added). The Davis court suggests that if there had been merely "evidence" of bad faith either "during the litigation" or "in seeking dismissal" id., this would provide independent grounds for either denying a motion to dismiss or awarding attorney's fees, even for work product that would otherwise not be compensable because it is usable in pending litigation.

In this case there is "evidence" of B&W's bad faith, both during the litigation and in seeking dismissal. Suggestions 24-38; Reply on Suggestions

11-25. But this evidence is not required for an award of Rule 41(a)(2) fees here, because, as discussed above, there is no pending or even contemplated litigation in which Parks' work product could be reused -- and therefore be left uncompensated on voluntary dismissal. Davis does not suggest that the lack of evidence of bad faith could justify the denial of Rule 41(a)(2) attorney's fees otherwise payable.

Davis lends no support, nor is even relevant, to the suggestion in the Magistrate's Report that a prior settlement offer would provide evidence of good faith, and no other support for such a rule is offered. Davis is therefore wholly inapplicable to the facts of this case, except as dicta providing additional, independent support to Parks' suggested conditions for dismissal with

prejudice or at least with substantial attorney's fees because there has been presented here "evidence" of B&W's bad faith which cannot be ignored.

The fact that B&W unnecessarily wasted Parks' and the court's time and effort in futile settlement negotiations, without ever presenting a reasonable settlement offer, can provide no basis for a finding of good faith when B&W finally moves to dismiss after exhausting every possibility for delay that its inadequate settlement offers could afford. Far from giving B&W credit for its "extensive efforts to settle," Mag. 4, Parks has shown that B&W's time-consuming and dilatory settlement tactic itself was in bad faith, because of its timing, and terms offering less than any court would grant on a Rule 41(a)(2) motion. Suggestions 35. B&W's settlement offers never amounted to more

than an attempt to cash in on the nuisance value of threatening to continue its groundless litigation in order to extract concessions from Parks that could not be obtained either through litigation or by Rule 41(a)(2) dismissal. See November 10, 1987 Letter to McClenahan from Hager, at 5-7. (This tactic included efforts to circumvent Parks' counsel by direct and indirect communications with his client. See e.g. Letters to McClenahan from Hager, January 3, and January 21, 1988.)

There is no precedent for relying upon the fact of plaintiff's prior settlement offer as a test of good or bad faith in seeking a voluntary dismissal without prejudice. Rather the proper test of good or bad faith dismissal, employed by every case that addresses the issue, is the actual reason for plaintiff's abandonment of its suit. The Magistrate's Report

inexplicably addresses the issue of B&W's bad faith in dismissing without ever mentioning B&W's stated or apparent reasons for voluntary dismissal.

Nothing like the reasons actually offered by B&W, i.e., its litigation expenses and delay in obtaining state and federal licenses upon which to premise its purported rights, have ever been found to constitute good faith reasons for dismissal in any reported case. No dismissing plaintiff has been reported even arguing the expense of litigation as a good faith reason for dismissal. It is surprising that the wholly owned subsidiary of a four billion dollar multinational corporation was not laughed out of court when it introduced this excuse to Rule 41(a)(2) jurisprudence in the context of abandoning a case against a small Township represented by a public

interest solo practitioner. This proffered excuse for dismissal is implausible to say the least.

More serious, however, is the Commonwealth of Pennsylvania's flat contradiction of B&W's assertion, in support of its second reason for dismissal, that DER has changed its policy toward the permitting of B&W's planned incinerator. The Commonwealth of Pennsylvania, in no uncertain terms, labels this second reason a "distortion." Memorandum of Law of Amicus Curiae, the Commonwealth of Pennsylvania, Filed in Support of Parks Township's Opposition to Plaintiff's Suggested Conditions Regarding Voluntary Dismissal (May 5, 1988) ("Amicus") 3. It is frankly a mystery, unsolved by the resounding silence of the Magistrate's Report on this question, how a reason can "appear" to be in good faith

when that reason has been contested as no more than "blue smoke and mirrors" by a third party government agency having first-hand knowledge of the facts. Id. 4.

Two novel reasons for dismissal which are 1) implausible and 2) factually disputed by a third party government agency can hardly be said to "appear" to be in good faith. Until the truth is arrived at through discovery 1/ or other actual fact finding concerning B&W's reasons for dismissal, the present record of implausible and contested reasons can only leave an appearance of deceit. This appearance cannot be altered simply by

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1/ Parks filed a Motion for Discovery Concerning B&W's Reasons for Voluntary Dismissal (May 12, 1988), which was summarily denied. In light of the recommended conclusion of the Magistrate's Report that "it appears that the plaintiff's motion to dismiss was brought in good faith," Parks hereby objects to and appeals from the denial of discovery on B&W's novel and unusually fact-bound reasons for dismissal.

leaving the evidence pertinent to B&W's stated and unstated reasons for dismissal unexamined.

3) The Magistrate's Report Ignores Parks' Suggested Conditions Relating to Discovery

The Magistrate's Report omits from its five recommended conditions for dismissing B&W's claims without prejudice not only the customary award of attorney's fees but also two other conditions, related to discovery, which were suggested by Parks as means to avoid the non-pecuniary legal harm from such a dismissal. The omission of these conditions is nowhere explained, or even mentioned, in the Magistrate's Report. Courts have held that the omission of conditions usually imposed on plaintiff's dismissal and the fixing of conditions not usually found should be explained. Reply on Suggestions 31.

B&W's compliance with Parks' discovery

requests before it obtains a dismissal without prejudice would avoid giving B&W an unfair advantage in the parties' preparations for any subsequent litigation. As it now stands, B&W will benefit from the advantage of having completed its discovery; whereas Parks' valid discovery requests are substantially unsatisfied because B&W has with impunity flouted the rules of discovery. Suggestions 31-33; Defendant's Reply Brief to Compel Discovery From B&W 4-6. A case cited by B&W itself shows that a condition requiring compliance with discovery is not unusual in a Rule 41(a)(2) dismissal. LeCompte v. Mr. Chip Inc., 528 F.2d 601, 603 (5th Cir. 1976).

B&W should also be prohibited from performing any additional discovery on matters from the period already covered during its first opportunity for discovery

against the Township Supervisors. Suggestions 31. "Obviously a second try would give plaintiffs additional time for pursuing discovery with the experience of the first behind them ..." Thomas v. Amerada Hess Corp., 393 F. Supp. 58, 70 (M.D. Pa. 1975). But a second try at discovery on B&W's claims would be unfair, provide opportunity for further needless harassment, and would therefore be prejudicial to Parks and the Supervisors. Id. B&W did not contest the propriety of Parks' suggested condition prohibiting further discovery by B&W on its dismissed claims.

II. B&W'S CLAIMS LACK MERIT BECAUSE THEY ARE NOT WELL FOUNDED IN FACT OR LAW

One important criteria in deciding a motion to dismiss without prejudice is whether plaintiff's suit was "vexatious." Suggestions 11; Reply on Suggestions 20. The Magistrate's Report concludes, without

mention of this criteria, or any discussion or apparent review of the relevant arguments, authority, and evidence, that "it cannot be reasonably argued that the plaintiff's action was totally lacking in merit." Mag. 4. But this is precisely what Parks' Reply Brief on Motion for Summary Judgment, argues, quite reasonably, and at some length. To give a single example, B&W fails to provide any factual grounds for its claimed possession of a property interest in polluting the air of Parks Township, an essential element of its § 1983 and § 1988 claims. Id. at 47. This and the other arguments made in support of Parks' Motion for Summary Judgment, demonstrating that B&W's claims totally lack any grounding in fact, have simply not been addressed in the Magistrate's Report.

The Commonwealth, as Amicus, supra, at

2, considers Parks' Motion for Summary Judgment "compelling." But, in assessing the merits of B&W's claims, the Magistrate's Report has simply ignored Parks' arguments in support of its summary judgment motion. The Magistrate's Report instead supports its recommendation that B&W's action was not "totally lacking in merit," only with the erroneous argument that B&W's action "withstood an initial motion to dismiss as well as an interlocutory appeal." Mag. 4-5. Under Rule 11, and the other tests for bad faith litigation, the legal merits and the factual merits of plaintiff's Complaint must be analyzed separately. This recommendation from the Magistrate's Report cannot withstand such analysis.

First, it can hardly be offered in support of the unassailableness of the legal merits of B&W's action that the

court entered a denial of Parks' Motion to Dismiss, when after ruling on Parks' Motion to Dismiss, Judge Teitelbaum found that there were "substantial grounds for difference of opinion" even as to the legal merits of B&W's Complaint. See Order (June 3, 1986). When a court certifies for interlocutory appeal the existence of grounds for difference of opinion as to the legal merits of a complaint, it does not inevitably follow that the complaint could not, under any circumstances, ultimately be found "totally lacking in merit."

Here the court found the legal merits of B&W's Complaint arguable even under a liberal Rule 8 notice pleading standard. The applicable standard for assessing the legal merits of B&W's civil rights claims is the far stricter specific pleading standard of Negrich v. Hohn, 379 F. 2d 213 (3d Cir. 1967). See Motion for Summary

Judgment, App. B, 10-12, and App. C, 3-9; Brief in Support of Motion for Summary Judgment on Plaintiff's "As Applied" Constitutional Claims 4-7; Standing and Jurisdiction Motion 3-4. When plaintiff fails to present "facts upon which to weigh the substantiality of the claim," Rotolo v. Borough of Charleroi, 532 F.2d 920, 923 (3d Cir. 1976), a civil rights claim will be held lacking in legal merit in the Third Circuit, notwithstanding that it might survive Rule 8 review, as B&W's Complaint did here. While the merits of B&W's complaint were doubtful even under a liberal Rule 8 standard, B&W's complete failure to present, at any time, the facts required to state a legally valid civil rights claim in this Circuit, shows this claim to be totally without merit under the applicable law. Accordingly, the court's certified Rule 8 analysis affords B&W no defense to a Rule 12(c) or 56

judgment for clear absence of legal merit in its civil rights claims, when those claims are measured, as is required in this Circuit, by the specific pleading standard invoked by Parks' Answer, at 9. See Rule 12(h)(2).

Second, the statement in the Magistrate's Report that B&W's Complaint "withstood ... an interlocutory appeal" simply misunderstands the procedural history of this case. B&W's Complaint could not have "withstood ... an interlocutory appeal." The Third Circuit Court of Appeals declined, without explanation, to permit an interlocutory appeal and therefore there was no interlocutory appeal to be "withstood." Moreover, the Circuit Court gave no reason for refusing, "in its discretion, [to] permit an appeal to be taken" by Parks. See 28 U.S.C. § 1292(b). The Court of Appeal's unfettered exercise of control

over its own docket thus has no bearing on the merits of this case whatsoever. See Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974) (Court of Appeals' § 1292(b) "discretion ... not limited to any specific criteria" and is similar to certiorari); Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950) (Frankfurter, J.) (denial of certiorari carries no implication whatever regarding merits). The Magistrate's Report commits clear legal error by suggesting that a procedural ruling denying interlocutory appeal is of any evidentiary weight at all in determining whether B&W's Complaint was lacking in either legal or factual merit.

Finally, even if the legal merits of B&W's Complaint had been firmly endorsed by either trial or appeals court on Parks' Rule 12(b)(6) motion, this would still have no bearing on whether there was any factual merit in B&W's claims, which is

only now at issue on Parks' Rule 56 motion. The test of the "vexatiousness" of this suit does not ultimately depend on whether B&W possesses the requisite skill to generally plead abstract constitutional claims under F.R.Civ.P., Rule 8. Rather the proper test is whether B&W is able to produce any evidence of the factual foundation necessary to provide some support for its generally pleaded facial constitutional claims. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully," U.S. v. Salerno, 107 S.Ct. 2095, 2100 (May 26, 1987). The evidence now offered by B&W shows that its challenge should never have been mounted at all.

The court's denial of Parks' Motion to Dismiss was based on the assumption that B&W might be able to produce evidence to support its claims. Under the liberal

Rule 8 pleading standards applied, the court's denial of dismissal held no more than that "it cannot be said at this time that B&W can prove no set of facts" that would bring this case within the seven general constitutional precepts pleaded in B&W's Complaint. Memorandum Opinion (May 12, 1986) 4, passim (emphasis added). But this liberal assumption does not affect in any way the issue of whether B&W's action was totally lacking in merit because, at this time Parks' Motion for Summary Judgment shows that B&W's claims are not "well grounded in fact." R. 11. Because B&W was not required to plead specifically, the court's certified ruling did not relate in any way to the specific facts of this case.

That a Complaint is held to arguably pass Rule 8 muster on the face of its generally pleaded claims, does not immunize it from attack when it is

subsequently revealed to lack any foundation in specific fact. See e.g. Waller v. Butkovich, 584 F.Supp. 909, 947 (M.D.N.C. 1984) (after motion to dismiss was denied "further relief [under R. 11] must await development of the facts"). Until the factual support offered by B&W in its affidavits is actually analyzed by the court, it is simply premature to make any conclusion, as the Magistrate's Report did, whether it "can be reasonably argued that the plaintiff's action was totally lacking in merit." Such a conclusion awaits some examination of the Motion for Summary Judgment, which was expressly and firmly stated by Magistrate Mitchell not to be before the court at the time of hearing B&W's Voluntary Dismissal. Indeed, the hearing on Parks' Motion for Summary Judgment was twice cancelled, at B&W's request and over Parks' objection, for purposes of settlement negotiations

and consideration of B&W's Voluntary Dismissal, and was not revived.

Mere absence of any actual prior assessment by the court of the legal merits of a claim in accordance with the applicable standard raised specifically as a defense in defendant's Answer, or of its factual merits in accordance with the evidence presented on summary judgment, can provide no support to a bare conclusion, premised on erroneous assumptions, about the legal or factual merits of plaintiff's action. Parks therefore objects to the summary and premature recommendation made by the Magistrate's Report concerning the merits of B&W's claim, since there is no indication that it is supported by any findings, or actual analysis of the facts or of the applicable law or of the relevant arguments in the record, and because it draws erroneous conclusions

from the two arguments it does take into consideration. Unless some proper assessment is made, the Magistrate's Report should be modified to state that there is evidence that B&W's claims are not well grounded in fact because B&W has failed to present any facts to support the asserted property interest upon which its claims are premised. Szabo Food Service v. Canteen Corp., 823 F.2d 1073, 1080 (7th Cir. 1987); Reply on Suggestions 17.

III. THE MAGISTRATE'S REPORT CONTAINS STATEMENTS FAVORABLE TO B&W WHICH HAVE NO SUPPORT IN THE RECORD.

Certain statements in the Magistrate's Report, though not necessarily directly germane to its recommended conditions for dismissal, are nevertheless inaccurate and are unsupported by the record or by any adequate findings. These errors tend consistently to understate, and none of them overstate, the equities favoring Parks in this case. Parks therefore

objects below to these inaccurate statements, in order to avoid any adverse implications from its silence at this time. Cf. Thomas v. Arn, 106 S.Ct. 466 (1985).

1) B&W Does Not Seek To "Modernize" Its Parks Facility But Rather to Introduce An Experimental Radioactive Waste Technology

The Magistrate's Report states that B&W "sought to modernize its Parks Township facility." Mag. 1-2. But the record shows that B&W sought to construct a new kind of plant in Parks for commercial incineration of radioactive wastes to be collected from waste generators around the country. E.g. Hamilton Affidavit, Att. B., Part 9. This has no connection to modernizing the existing Parks' facilities, which are not presently utilized in this business.

There is no support in the record for including the construction and operation

of an experimental commercial radioactive waste incineration technology within the normal definition of "modernize." The term as used in the Magistrate's Report is simply malapropos, contrary to the dictionary understanding of "modernize" as "adopting something characteristic of the present time." B&W's planned experimental commercial radioactive waste facility cannot be characteristic of nuclear facilities in the present time because it exists nowhere known at present except on B&W's drawing boards.

The term "modernize," employed here for its positive, progressive connotation, is an inappropriate euphemism for a risky, untested technology unable to obtain the endorsement of even the Nuclear Regulatory Commission, and it should be struck from the Magistrate's Report.

2) <u>There Has Been No Change With Respect To Parks' Ordinance That Might Justify B&W's Dismissal</u>

"B&W argues," according to the Magistrate's Report, "that since all obstacles initially posed by the Ordinance have either been removed or resolved by the parties, the complaint should be dismissed without prejudice." Mag. 2-3 (emphasis added). There is no basis in fact or in the record for such a statement. Parks has not "removed or resolved" any "obstacle" which the Ordinance might have "initially posed" to B&W's plans. Parks has in no way retreated from its original position that the Parks Ordinance is valid in its entirety. Parks has not altered the Ordinance in any way, nor has it made any agreement or representation that it would enforce the Ordinance other than to the full extent of its terms, as enacted.

It is difficult to discern just what evidence the Magistrate's Report would rely upon for this statement. The only

suggestion is at page 2 of the Magistrate's Report where it seems the Magistrate's Report considered the fact that Parks' "has licensed the compactor" a cause for B&W's dismissal of its Complaint. Parks licensed the compactor on February 26, 1987, one month after it received B&W's application and nearly a year before B&W's Voluntary Dismissal. B&W's application, submitted to Parks more than one year after filing of this suit, expressed "B&W's position that it has no legal obligation to obtain an air quality certificate for its compactor" because "B&W believes that even under the terms of the Ordinance, no air quality certificate is necessary to operate the compactor." January 26, 1987 letter to Rishel from Culberson, at 1. Parks had not taken a legal position on this issue prior to B&W's application, and the issue did not figure in B&W's lawsuit. Contrary to

B&W's assumption when it filed its lawsuit, Parks held that the Ordinance did in fact require B&W's compactor both to obtain an air quality certificate and to comply with the other terms of the Ordinance. Thus no issue related to this lawsuit was "removed or resolved" by Parks' subsequent licensing of B&W's compactor in accordance with the Ordinance. A stricter interpretation of the Ordinance than B&W anticipated when it filed its suit, which imposed new obligations on B&W which it did not believe existed when it filed its suit, could obviously not have prompted B&W's Voluntary Dismissal.

Indeed, B&W made no allegation of this kind in its statement of reasons for dismissal. The Magistrate's Report provides no reference to the record where B&W at any time made such an argument that it was dismissing because Parks had

removed some obstacle previously thought to be presented by its Ordinance. If B&W had made such an argument it would have been a gross distortion of reality, which could only have been understood as an attempt to justify B&W's otherwise inadequately explained dismissal, by creating a false impression that Parks had made some favorable change with respect to the Ordinance, or its enforcement.

The issues in dispute here have been "removed or resolved" not by the "parties," as the Magistrate's Report, at 2, suggests, but solely by B&W's second thoughts about pursuing this case. It is B&W's own plan to build an incinerator that has been unilaterally "removed" from B&W's drawing boards, and not any "obstacle posed by the Ordinance." A characterization that would not depart from the record of this case would be that B&W has abandoned its incinerator in the

face of its inability to obtain an NRC license and because of "its desire to leave the legal battlefield unscathed and challenge the Parks Township ordinance at a later time." See Amicus 4. The statement in the Magistrate's Report about an unidentified action by the "parties" that "removed" or "resolved" obstacles to B&W's plans would suggest a non-existent good faith reason for B&W's dismissal which B&W itself lacked the temerity to assert.

The Magistrate's Report is closer to the actual facts when it states: "It would appear that by agreeing not to install its incinerator" B&W "no longer has a necessity to challenge the constitutionality of the Ordinance." Mag. 4. But then this articulation begs the important question whether B&W ever had a "necessity" to challenge the Ordinance before it obtained the required federal

and state licenses for its incinerator. B&W has "agreed" not to install its incinerator because -- by its own admission -- it lacks those licenses which would make it lawful to do so. At present and at all times since B&W filed its Complaint it would have been illegal under both state and federal law for B&W to install and operate its incinerator as planned. Reply on Summary Judgment 49. Accordingly it is in error to say that because of B&W's "agreement" [not to violate the law], there is "no longer ... a necessity" for suit -- when, for the identical reason, there never was a necessity for B&W to sue Parks Township over asserted rights before they even arguably came into existence.

The Magistrate's Report should be modified to reflect the facts actually supported by the record, that B&W sued prematurely and has now abandoned this

suit because it does not possess the licenses upon which its claims were predicated.

3) **The Magistrate's Report Misstates Parks' Response to B&W's Voluntary Dismissal**

The Magistrate's Report states that Parks' Motion for Summary Judgment on Grounds of Standing and Jurisdiction (January 18, 1988) ("Standing and Jurisdiction Motion") is "before the court for disposition," Mag. 1, and then proceeds to divert attention to this motion, Mag. 2-3, which has never been advanced by Parks, or mentioned, since the time it was filed, and is no longer relevant to this case. The Standing and Jurisdiction Motion, like Parks' other pending motions, was never argued and was not before the court, until it was revived for purposes of discussion in the Magistrate's Report.

At oral argument Magistrate Mitchell

clearly and firmly indicated that the only matter before the court was B&W's Voluntary Dismissal. If Parks' Standing and Jurisdiction Motion was thought to be "before the court" simply because it was still pending and ready for decision, though not argued, then Parks' other pending motions should also have been equally "before the court." Infra pp. 37-38.

Parks has on several occasions sought to trigger action by directing the court's attention to these other motions by reference to the fact that these motions remain pending, e.g., Suggestions 30, 32-34; whereas Parks has never sought to trigger action on the Standing and Jurisdiction Motion since it was filed. Indeed, Parks' expressly qualified its request for judgment, on these grounds of jurisdiction and standing, by stating that judgment should be entered against B&W's

claims only "if they are not first voluntarily dismissed by B&W." Standing and Jurisdiction Motion 9.

There is now no reason for singling out the superseded Standing and Jurisdiction Motion for discussion in the Magistrate's Report, and the Magistrate's Report does not attempt to provide one. Although the Magistrate's Report states that Parks' Standing and Jurisdiction Motion is, alone of Parks' pending motions, "[p]resently before the court," either, as the magistrate stated in oral argument, only B&W's Voluntary Dismissal is before the court, or all of Parks' unargued pending motions are before the court.

This matter is even more puzzling because after stating that the Standing and Jurisdiction Motion is before the court, the Magistrate's Report does not directly dispose of the motion, other than suggest it is moot, infra pp. 36-37, even

though the issue it presented is said to raise "a real question." Mag. 5.

The Magistrate's Report commits a more egregious error with respect to the Standing and Jurisdiction Motion when it states that Parks had "countered" B&W's Voluntary Dismissal with its Standing and Jurisdiction Motion. Mag. 2. This was not the case. Parks made its Standing and Jurisdiction Motion a substantial period of time prior to B&W's Voluntary Dismissal, in the midst of active settlement negotiations, so it logically could not have "countered" B&W's later motion. Parks' Standing and Jurisdiction Motion was, by its own terms, id. at 9, superseded, if not mooted, by B&W's Voluntary Dismissal, and, as mentioned, the arguments made there were never revived or repeated at any time after filing of B&W's Voluntary Dismissal.

Magistrate's Report should revive a motion which was first presented orally on January 7, 1988 and was briefed at Magistrate Mitchell's request on January 18, 1988. The motion became immediately ripe for decision as a means for quickly disposing of this case, but instead was allowed to lay dormant four full months before now being addressed by the court.

Though this Standing and Jurisdiction Motion is not especially relevant to B&W's Voluntary Dismissal, having preceded it, the Magistrate's Report erroneously presents the Standing and Jurisdiction Motion as the Township's response to B&W's Voluntary Dismissal, Mag. 2-3, in place of any reference whatsoever to the Township's actual response presented in briefs that did directly counter B&W's instant motion. The actual response to B&W's Voluntary Dismissal was not that stated on page 3 of the Magistrate's Report as representing

what "the Township now argues." The Magistrate's Report, while rediscovering an unrelated and superseded argument made before B&W's Voluntary Dismissal was even filed, inexplicably ignores in toto the briefs which do state what Parks actually does "now argue" in response to B&W's motion.

Parks objects 1) to the failure of the Magistrate's Report to address any one of Parks' arguments actually submitted in response to B&W's Voluntary Dismissal and 2) to its inaccurate representation that a prior unrelated motion contains Parks' argument in response to B&W's motion now before the court.

4) All of Parks' Pending Motions Are Not Moot.

The Magistrate's Report states that presently before the court are two motions:

1. B&W's "Motion for Voluntary

Dismissal Without Prejudice" (February 1, 1988), and

2. Parks' "Motion for Summary Judgment on Grounds of Standing and Jurisdiction" (January 18, 1988).

Mag. 1. The Magistrate's Report recommends granting B&W's Voluntary Dismissal but fails to make any express recommendation as to Parks' Standing and Jurisdiction Motion, except to suggest that "the remaining motions [sic] be dismissed as moot." Mag. 1. Because the Magistrate's Report fails to mention any other motions that were pending before the court and expressly states that only one of Parks' motions, the Standing and Jurisdiction Motion, was before the court, it is possible that the Magistrate's Report intended to recommend that only this motion be mooted.

A) Express Withdrawal of Parks' Standing and Jurisdiction Motion

Whether or not technically mooted, Parks' Standing and Jurisdiction Motion was superseded by B&W's Voluntary Dismissal. It was first advanced in chambers by Parks during discussion of settlement as a reason for immediate dismissal of B&W's suit. It was offered as a means to avoid any further waste of time, delay and expense from court-ordered settlement negotiations over B&W settlement terms which were clearly unreasonable and were being used to forestall hearing of Parks' July 1, 1987 Motion for Summary Judgment.

The Standing and Jurisdiction Motion was not set for argument. Indeed B&W did not file any response within the required 10 days, instead responding to Parks' motion only by filing its Voluntary

Dismissal. Later, without any explanation for its three month delay, B&W did submit an opposition to Parks' Standing and Jurisdiction Motion only days prior to argument of its Voluntary Dismissal.

Since the time of its filing, the purpose of Parks' Standing and Jurisdiction Motion has been defeated by delay, and by the continued, expensive pursuit of proceedings with respect to B&W's settlement and Voluntary Dismissal offers. To avoid all doubt about the continued relevance of this motion in the present posture of this case, Parks hereby expressly withdraws its Standing and Jurisdiction Motion.

B) Other Motions Still Pending

Parks' other motions that were still pending at the time of the hearing on B&W's Voluntary Dismissal are:

1. Motion for Summary Judgment (July 1, 1987);

2. Parks Township's Application for Order Compelling Plaintiff to Comply with Discovery Requests (June 19, 1987) (Rule 37(a)(4) expenses);

3. Motion to Quash Subpoena of Attorney for Parks Township and for Protective Order (August 24, 1987) (Rule 16(f) sanctions);

4. Motion in Opposition (etc.) and Under Rule 11 (March 5, 1988).

The Magistrate's Report fails to explain why any of these other pending motions would be moot. The Magistrate's Report is wrong that "dismissal of the action renders all such matters moot," if it intended to refer to these motions. Mag. 7. The first two motions, for Summary Judgment and to Compel Discovery, are not moot. The Magistrate's Report ignores both motions, though they are still relevant upon B&W's request for voluntary dismissal. Parks requested that

these motions be granted in response to B&W's Voluntary Dismissal, and under the facts of this case one or the other motion should be granted, unless the case is dismissed with prejudice. Suggestions 19-21. Parks objects to the recommendation that these motions be found moot on the grounds that, as argued elsewhere, it would be error not to grant these motions under the circumstances of this case.

The last three motions listed above contain requests for sanctions and attorney's fees. These motions are not mooted by a Voluntary Dismissal. An award of Rule 41(a)(2) attorneys fees, might have mooted these motions. But no fees have yet been granted for work represented by these three pending motions, and the reasons for granting fees, fully briefed in these motions, are not affected in any way by a dismissal without an award of

fees.

5) Parks Has A Legitimate Reason To Request Denial of B&W's Dismissal Without Prejudice, Unless It It Properly Conditioned To Protect Parks' Interests

The Magistrate's Report states that there "appears to be no legitimate reason at the present time for Parks to seek to have the Ordinance's constitutionality adjudicated" Mag. 5. The legitimate reason is that Parks has invested enormous legal resources in this adjudication, and unless it is dismissed with prejudice or Parks' efforts are fully compensated, it is prejudiced by having neither a ruling on its summary judgment motion at this time nor the resources to duplicate its efforts when the issues are raised again. Under the present wording of the recommended conditions in the Magistrate's Report, Parks will risk the duplicitous expense of relitigating these claims if it ever attempts to enforce its Ordinance

against B&W. For the legitimate reason that it constitutes legal and practical prejudice to subject Parks to such duplicitous litigation, it would be preferable for Parks to obtain a summary judgment ruling at this time, unless a dismissal on the terms normally provided in such a case is ordered, and accepted by B&W.

IV. THE CONDITIONS RECOMMENDED BY THE MAGISTRATE'S REPORT ARE INADEQUATE TO FULLY PROTECT PARKS FROM LEGAL PREJUDICE

The Magistrate's Report recommends five conditions to insure, as is required by Rule 41(a)(2), that this suit "will not result in an inequity to the defendant." Mag. 3. They do not do so. Surprisingly none of the three conditions suggested by Parks are included in the five recommended conditions. But three conditions suggested by B&W are among the five recommended conditions, even though it is

defendant's interests that are to be protected by a Rule 41(a)(2) order, Suggestions 4, Reply on Suggestions 23, and these are not conditions usually imposed.

Conditions concerning litigation costs and discovery matters, as requested by Parks, are conditions customarily provided on motion to dismiss without prejudice under the circumstances of this case. But the Magistrate's Report inexplicably fails to even address these customary conditions, and instead substitutes unusual conditions which are inadequately justified. Parks has objected in Part I hereof to recommendations excluding any one of Parks' requested conditions. Some conditions that are recommended in the Magistrate's Report are in many respects incomplete and ambiguously drafted, and thus, under certain circumstances, could create more problems than they solve.

Others provide less than meets the eye.

The principal omission from the unusual conditions in the Magistrate's Report is that no means of enforcement is stated. What value these conditions might have for Parks will depend upon whatever enforcement is available to the Township, and whatever interpretation these conditions might be given, in another lawsuit. Another lawsuit is precisely what Parks seeks to avoid. By contrast, the more customary conditions of fee payment and discovery compliance would be immediately enforceable by threat of dismissal with prejudice. Since the unusual conditions of the Magistrate's Report are continuing obligations, subject to interpretation, they cannot be easily implemented by the usual mechanism of conversion into a dismissal with prejudice.

The recommended conditions, especially

condition 3, suffers the inherent defects of an effort to adjudicate a settlement. They could spawn further litigation, just to obtain what little value they possess for Parks, though the very prejudice against which Parks seeks protection is just such open-ended exposure to expensive litigation in which B&W enjoys the inherent advantage of its vastly superior resources. Parks asks merely the value -- or its fair equivalent -- of having brought this case to the point of summary judgment on the merits. This is what Parks is due, but would not obtain from the conditions recommended by the Magistrate's Report. Instead B&W would be allowed to "bail out scot-free to try the same claims" again, with unimportant restrictions, after "seeing the adverse handwriting on the wall." Davis, 819 F.2d 1277 (dissent). B&W's interest in preserving its claims, while also escaping

payment of the customary price therefor of Rule 41(a)(2) attorney's fees, has been well-served, although, according to B&W's own cases, the "equities of the plaintiff are not a subject of consideration" under Rule 41(a)(2). E.g. Home Owners' Loan Corp. v. Huffman, 134 F.2d 314, 318 (8th Cir. 1943); Reply on Suggestions 23.

Neither their value to Parks nor the reasons for these recommended conditions is easy to ascertain. They may ultimately do little to alleviate the prejudice to Parks from duplicitous litigation. They raise threshold questions of jurisdiction and whether they have the effect of res judicata, or have some lesser contractual effect, such as would a settlement agreement. Such problems will not be easily resolved if left to subsequent litigation. If these conditions from the Magistrate's Report are to be retained, over Parks objection, the Order should at

least state that the sanction for their violation will be contempt of the District Court, which would be purged only after payment to Parks of a liquidated sum measured by Parks' reasonable attorney's fees in this suit. They should also be redrafted to avoid some of the most obvious problems of interpretation. The suggested changes in each of the five conditions, as incorporated in the attached proposed

Order, is discussed separately below.

Condition 1. Since B&W has already submitted to the court evidence of its withdrawal of the DER permit request for its incinerator, see Response to Reply on Suggestions, Exh. C., a condition requiring withdrawal of this request provides nothing of value to Parks. The NRC and EPA license requests are still pending, and a DER permit request could be easily refiled once federal licenses are obtained. Indeed the DER has clearly stated that it would not process a permit request for the incinerator until the NRC license is obtained. Leave to Reply, Exh. 1.

To be at all meaningful, this condition should require withdrawal of all outstanding state or federal license requests related to the incinerator, and prohibit any filing of such requests for any commercial waste incinerator in Parks

Township in the future.

Condition 2. The language of this condition is circumlocutory. It should state directly that: "*Any air emissions from B&W's Parks Township facility shall comply with the emissions standards established in Parks' Ordinance.*" In the absence of an express enforcement provision it is difficult to understand what value this condition would have beyond the terms of the Ordinance itself.

Condition 3. This condition is underinclusive. It is intended to permit B&W to revive all of its facial constitutional claims in a second action -- without paying the customary fees for its first time around in this suit -- in case Parks amends its Ordinance. But it does far more than that, perhaps inadvertently.

This case presents a somewhat unusual situation where the same claims that

formed the basis for B&W's Complaint could, and surely will if not precluded here, also be raised again whenever Parks attempts to enforce its Ordinance. B&W has stated that it wants to preserve its right to reassert its claims in this suit as defenses against subsequent enforcement of the Ordinance. Response to Suggestions 39-40. It is, indeed, at this time less likely that B&W would attempt to commence suit against Parks again than that it would simply require Parks to litigate to enforce its Ordinance and then raise by defense or counterclaim the same expensive claims it has already litigated once in this case.

The third condition of the Magistrate's Report, though it may not have intended to, does not expressly preclude B&W from again raising these claims in such circumstances not involving amendment of the Ordinance. It is thus now unclear

whether this recommended condition from the Magistrate's Report would include the raising of these claims as a defense or counterclaim within its definition of an "action" in which relitigation of B&W's present claims would be precluded. Thus, while this condition appears to protect Parks from much of the legal harm caused by a dismissal without prejudice, it actually leaves the greater part of the problem unsolved. Moreover, since these claims might be raised in defense next time around they could also escape the residual curative provisions of Rule 41(d) as well.

A second problem with the third condition is that B&W could argue that any interpretation of the Ordinance which it did not anticipate, see e.g. p. 31 supra, is a "change" in the Ordinance and meet Parks' attempts at enforcement and administration with threats of litigation.

B&W would probably further complicate matters by invoking the record of this case as "legislative history" or the "negotiating record" to argue that the third condition intended this or that interpretation by Parks to be considered a "change." The third recommended condition should make clear that only a formal amendment, a change in the written terms of the Ordinance, and not mere interpretation or enforcement of its present terms, will permit B&W's relitigation of the claims presented in this case. Otherwise this condition will be a recipe for multiplying the disputes involved in this case rather than for resolving them

To protect Parks adequately from duplicitous litigation of B&W's claims in a future action, this condition should provide that: "*So long as the written terms of the Ordinance remain unchanged in*

respects material to this litigation, B&W will raise no claim in any legal action challenging the facial constitutionality of the Ordinance."

Condition 4. This condition, allowing reuse of discovery obtained by Parks, is of little value to Parks unless it is coupled with an order granting Parks' discovery requests. B&W has refused Parks any discovery of substance, for reasons which simply defy the Federal Rules. Barring a condition compelling discovery, at the very least a condition should be imposed prohibiting B&W from destroying or disposing of any material arguably discoverable under Parks' documents requests, unless B&W first offers them to Parks. Otherwise, after this case is dismissed, Parks could well be prejudiced in any later suit by loss of important discovery material identified by Parks' requests in this suit. The draft

of this condition can benefit from greater clarity.

Condition 5. By granting an award that does not refer exclusively to taxable costs under 28 U.S.C § 1920 or Rule 54(d), but instead to defendant's "costs exclusive of counsel fees it reasonably incurred," the Magistrate's Report doubtless intended to award taxable costs plus other expenses reasonably incurred. To avoid any later dispute about this, the court should insert "and expenses" after the word "costs" in this condition to make it abundantly clear that the costs recoverable on this Rule 41(a)(2) dismissal are not limited to taxable costs. See Union National Bank of Youngstown v. Superior Steel Corp., 9 F.R.D. 117, 122 (W.D. Pa. 1949); Suggestions 2.

CONCLUSION

The Magistrate's Report should be

rejected. The court should set down for argument and hear, de novo, Parks' request for denial of B&W's Voluntary Dismissal and for grant of summary judgment. Alternatively the court should grant the motion only with prejudice or on other customary conditions, as was requested by Parks in the proposed Orders submitted with its February 24, 1988 Suggestions, and attached hereto. If the five conditions for B&W's dismissal recommended by the Magistrate's Report are to be adopted, they should be redrafted in accordance with the corresponding terms contained in the proposed Order attached hereto, and supplemented with an enforcement provision.

Respectfully Submitted,

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June 4, 1988